Supreme Court, U. S.
FILED
MAY 10 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1607

JOHNSON, DRAKE & PIPER, INCORPORATED,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

E. NOELES LOWE
630 Fifth Avenue
New York, New York 10020
Attorney for Petitioner

CHARLES B. MOLINEAUX, JR.
630 Fifth Avenue
New York, New York 10020
Of Counsel

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No.

JOHNSON, DRAKE & PIPER, INCORPORATED,

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v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Johnson, Drake & Piper, Incorporated, a corporation organized under the laws of the State of Minnesota, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of the State of New York entered in this proceeding on November 15, 1977.

Opinions Below

The opinion of the Court of Appeals is reported at 43 N.Y.2d 677, 371 N.E.2d 786, and 401 N.Y.S.2d 23, and appears in the appendix hereto (p. A1). The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Department, is reported at 49 A.D.2d 776, 372 N.Y.S.2d 242 and appears in the appendix hereto (p. A3). The opinion of the Court of Claims of the State of New York is unreported and appears in the appendix hereto (p. A6).

Jurisdiction

The memorandum decision of the Court of Appeals of the State of New York sought to be reviewed was filed on November 15, 1977. A timely petition for rehearing was denied by the Court of Appeals on February 9, 1978 and this petition for certiorari has been filed within 90 days of that date. The jurisdiction of this Court to review the decision of the Court of Appeals by writ of certiorari is believed to be conferred by 28 U.S.C. § 1257(3).

Questions Presented

1) Whether due process was denied to petitioner by the cumulative effect of the actions of the State Court of Claims, in an action against the State, where the trial judge:

a) admitted into evidence, over petitioner's objection, a State-prepared claim report containing legal conclusions, hearsay and opinion statements regarding which report no meaningful cross examination was possible, while stating that he *would* disregard all objectionable material in the report; but

b) nevertheless based his decision almost entirely *upon* the State claim report, mechanically adopting large portions thereof, ignoring the contrary evidence presented by petitioner.

2) Whether the action by the State appellate courts, allowing the Court of Claims Act to be interpreted as to permit decisive reliance by the Court of Claims upon the above-mentioned claim report, in lieu of testimony and cross examination, was such a departure from the rules of evidence and the norms of due process as to be violative of the requirements of the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

This case involves the first section of the Fourteenth Amendment of the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

This case also involves the New York Court of Claims Act, § 8, which provides as follows:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the *same rules of law as applied to actions in the supreme court against individuals or corporations,* provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law. (Emphasis added.)

Statement of the Case

Nature of the Claim

This action arose out of a contract between petitioner, a Minnesota corporation, and the State of New York, Department of Public Works, entered into in October 1961, for construction with federal aid of a highway interchange in Queens County in New York City.

As a direct result of performing the work under this contract, petitioner and its subcontractors suffered actual, out-of-pocket losses (job expenditures beyond job receipts) of over $2,500,000 due to action and misrepresentations of State officials.

Claim was brought in the New York State Court of Claims, pursuant to the Court of Claims Act, alleging breach of contract by the State in that, 1) the State had misrepresented the foundation work to be performed by altering before bidding date the design documents prepared by the State's own consultants; 2) the State had improperly directed the work of petitioner in the field so as to cause increased, delayed, and unnecessary foundation work; and 3) the State had refused time extensions to petitioner, threatened termination and demanded costly acceleration of the work to meet the original contract completion date.

Trial

Trial of the claim herein, before Judge Adolph C. Orlando of the Court of Claims, took place over 23 days. Petitioner's proof included testimony from engineers who had prepared the contract bid to the State, testimony from construction personnel who had been on the job daily, testimony from an independent soils and foundation engineer, testimony from subcontractors of petitioner, and pertinent records of the State and petitioner (A1-2847).

The State's case, on the other hand consisted of negligible direct testimony (A2960-3046) but included a bulk submission of boxes of correspondence (Exs. Q & R) and a lengthy "claim report" (Ex. Y), over 200 pages long, which had been prepared for the State Department of Public Works by the State's retained consultants. The claim report and the correspondence were received by the trial judge in evidence, over objection (A2975-6, A2865), even though he acknowledged after a "quick perusal" that

the claim report contained conclusions, hearsay and "other objectionable material" (A2979). He stated, "I'm going to disregard completely all of the evidence which I feel in this report that is objectionable in accordance with the rules of evidence of this State" (A2979-2980).

Following trial, requested findings of fact were submitted by petitioner and by the State Attorney General (A3271-3307).

Trial Court Decision

Contrary to his statement at trial, however, the trial judge did not disregard the many improper portions of the report but incorporated conclusions, hearsay, allegations and argumentation therefrom into his decision, in rejecting virtually all of the petitioner's claim. Many findings were made on matters calling for expert opinion evidence, solely on the basis of hearsay statements taken directly, and sometimes *verbatim,* from the claim report. Page after page of his "decision" can readily be tracked in the report, including verbatim passages and even typographical errors. A partial comparison of the claim report with the decision accompanies this petition in the appendix (p. A59).

The trial court refused to pass upon any of the requested findings of either party (Appendix, p. A57).

Appellate Decisions

On appeal, the Appellate Division, in its brief opinion, tersely stated that, "as trier of both the law and the facts, the lower court was entitled to rely" upon the claim report "to the extent that it deemed justified in reaching its decision," and apparently took the position that the Court of Claims cured any error with respect to the admission of such report into evidence when "it specifically informed the attorneys for both parties on the record that it *would* disregard any objectionable material contained therein." (Appendix, p. A5; emphasis added.)

On appeal to the Court of Appeals, that court agreed with the Appellate Division, that the State Court of Claims was entitled to rely upon the claim report prepared by the State's consultants, as stated in the decision of which this petition seeks review (Appendix, p. A2).

The stage in the proceedings at which denial of due process herein became fully apparent was after trial, at the time of the *decision* of the court of first instance. It could not have been earlier anticipated that the trial judge would heavily depend upon the report's improper portions after having said they would be ignored. (The trial record reflects vigorous objection to the exhibit being received (A2975-2976) and also reflects that meaningful cross examination could not be conducted because those who actually prepared the report were not produced by the State. When questioned as to the report on cross, the witness who identified it responded, "I don't remember" or "I don't know," over fifty (50) times (Tr. A2980-3046) and acknowledged "I didn't prepare any of the report" (A3036).)

In petitioner's brief to the intermediate appellate court, it was pointed out that the State report had been prepared by persons whom petitioner had had no opportunity of cross-examining, that the trial judge had not ignored the improper parts of the report as promised but had paraphrased them, and that petitioner's right to an independent judgment by the court on proper evidence had been ignored. The Appellate Division passed upon the process followed, stating that the lower court was entitled to rely upon the claim analysis.

At the Court of Appeals of the State of New York, the procedural unfairness of the trial court was again pointed out, petitioner noting in its briefs that the usual presentation of testimony by experts subject to cross-examination had been dispensed with, that the trial judge had not ignored the conclusions, hearsay and opinion statements in the report but had mechanically adopted them, and that

the trial court had delegated its judicial function to the executive branch instead of independently discharging its responsibility (citing *United States* v. *El Paso Natural Gas Co.*, 375 U.S. 651, 656, 657).

Petitioner pointed out that this improper procedural shortcut substituted for a decision on the trial evidence the pre-trial determination of the same State administrative agency involved in the litigation. Petitioner noted that the irregular procedure followed by the court was contrary to the intent of the Constitution and contrary to the concept of the separation of powers and judicial independence, in the name of expediency (citing Judge Brandeis' dissenting opinion in *Meyers* v. *United States*, 272 U.S. 52, 293). It was pointed out that the claim report had been the core of the State's defense (the State having called only four witnesses: the witness who identified the claim report, who gave little direct testimony (A2960-3046), two State employees who merely identified records (A2850-2869, A2945-2960), and an auditor on damages (A2869-2944)); in this context, petitioner's fundamental right to cross-examination and to a reasoned decision on proper evidence had been substantially violated.

The Court of Appeals passed upon the question thus presented, rejected petitioner's argument and specifically approved the trial court's manner of use of the claim report.

REASONS FOR GRANTING THE WRIT

POINT I

Certiorari should be granted to review state judicial action which has endorsed the ignoring of fundamental due process where there was received at trial a report, admittedly containing improper portions, without cross examination, and where thereafter the trial judge extensively and decisively relied upon its improper portions, despite his statement that the improper portions of the report would be disregarded.

New York State has waived sovereign immunity and has agreed to be subject to suit in contract cases. Section 8 of the New York Court of Claims Act provides that the State waives immunity and consents to have its liability determined in accordance with the same rules of law (both as to evidence and substantive law (*Horoch* v. *State*, 286 App.Div. 303, 143 N.Y.S.2d 327)) as applied in actions against individuals or corporations. While a state cannot be compelled to provide a means by which a suit can be brought against itself (*Carolina Glass Co.* v. *South Carolina*, 240 U.S. 305 (1915)), once having thus waived immunity and having agreed with those with whom it contracts to being subject to suit, New York cannot allow its courts to function in a manner that ignores fundamental due process. At the very least, it cannot restrict the waiver by a curtailment on the statutorily established judicial procedure with respect to state contracts entered into in the expectation of the availability of a judicial remedy.

Even if it be argued (as the State has) that it is expedient to dispense with the normal rules of evidence in a large complicated case against the State, there cannot be one law of evidence and procedure for the sovereign and another for those who contract with the State, in the face of the language of Section 8 of the Court of Claims Act.

Here due process was violated by the cumulative effect of:

> lack of advance notice of the claim report, the heart of the State's case, not seen by petitioner before trial; the improper receipt by the court of the report as "evidence" when it was a multi-authored conglomerate of hearsay, conclusions and opinion on the whole of petitioner's claim; and
>
> the lack of confrontation and cross examination of the report's largely anonymous authors.

Additionally, petitioner was precluded from offering rebuttal testimony to the improper parts of the report because those parts of the report were to have been disregarded and ignored by the trial court, i.e., treated as though never before the court at all. The trial court's about-face in its decision, and mechanical adoption of the report, thus not only improperly mingled State executive and judicial functions but also denied petitioner an opportunity to rebut the State's case. *Prior* to the decision, petitioner had a right to assume that the court would do what it said it would do—ignore the improper parts of the report. Rebuttal was unnecessary. Analogously, in *Saunders* v. *Shaw*, 244 U.S. 317 (1917), the act complained of was similarly done unexpectedly when the complaining party *no longer had any right to add to the trial record*. Justice Holmes of this Court said that, "it would leave a serious gap in the remedy for infraction of constitutional rights," if a party were bound to contemplate a later decision by a court which would render trial proof necessary which, based upon trial rulings, was apparently unnecessary (244 U.S. at 320; see also discussion of *Saunders* in *Hamling* v. *United States*, 418 U.S. 87 (1974), dissenting opinion of Justice Brennan at p. 149).

This Court, ought to scrutinize closely the procedural fairness, impartiality and neutrality of the State-estab-

lished forum where large claims against the State are to be judicially determined. To allow reliance by the State courts upon a report prepared under the aegis of the involved administrative agency, naturally inclined to cover up or rationalize its own mistakes and misrepresentations, is to denigrate the judicial process and slide into judicial inertia at the ...pense of a fair hearing. (Cf. Grey, Due Process: Procedural Fairness and Substantive Rights (edited by Pennock and Chapman) New York, 1977, pp. 182, 187).

The *procedures* by which the facts of a case are determined by the factfinder assume an importance fully as great as the validity of the rule of law applied, as this Court noted in *Wingo, Warden* v. *Wedding,* 418 U.S. 461 (1974). In testing whether state law applied by a state court is action within the due process clause of the Fourteenth Amendment, this Court can well examine the circumstances of the factfinding process in order to make a constitutional judgment (*Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 53, 54 (1971)).

Related to the trial court's complete dependence on the report, but a separate violation of petitioner's due process rights, was the failure and refusal of the trial court to pass on issues tendered at the trial and covered in the requested findings. If the essence of due process is to "proceed upon inquiry and render judgment only after trial," due process was not afforded here where the substance of the decision was written before the trial began.

POINT II

It is important for the Court to hear this case since an interpretation of the New York Court of Claims Act which condones a deviation from normal trial procedures and rules of evidence will set a precedent for the trial of future construction claims in New York State and elsewhere.

If State action, whether under the authority of legislative or judicial interpretation, deprives an individual of a fundamental constitutional right, this Court may review such action. The necessary effect of the action of the State courts herein is to interpret the Court of Claims Act so as to establish different rules for the trial of construction claims deemed complex, rules so relaxed as to be repugnant to due process. This was the rationale urged by the Attorney General on appeal who argued that the case was "a multi-cause of action construction contract claim involving technical subject matter" (Br., p. 43); this view, was seemingly accepted by the appellate courts. (This case was actually far less complex than many construction contract cases routinely decided elsewhere on a reasoned review of the valid evidence.)

There should be equal standing before the courts of the State and equal entitlement to due process whether a claimant is in the State Court of Claims as a resident landowner in an appropriations claim or as a foreign corporation in a construction contract claim. A distinction between ordinary cases and construction cases for the application of the rules of evidence is unsupportable.

This case has prospective significance because similar situations are bound to recur in future cases under the New York Court of Claims Act, and probably in other states as well under parallel state law, if this case is allowed to stand as precedent. Already, in at least one

other case in the New York State Court of Claims subsequent to this case, the Attorney General urged admission of a similar report in lieu of the usual procedure for presenting evidence, in the same fashion, to save time; in citing this case, the Attorney General noted that "new law" was involved. (*Conduit and Foundation Corp.* v. *State* (Ct. Claims, Claim No. 54809, Tr. 3642, 3651)).

Thus, certiorari is particularly appropriate to clarify the law with respect to the future construction claims which will recur under federal aid and federal grant programs and in which the same questions with respect to due process, and with respect to the Court of Claims Act, are bound to arise.

Conclusion

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

E. NOBLES LOWE
630 Fifth Avenue
New York, New York 10020
Attorney for Petitioner

CHARLES B. MOLINEAUX, JR.
630 Fifth Avenue
New York, New York 10020
Of Counsel

Appendix A, Decision of Court of Appeals, State of New York.

STATE OF NEW YORK
COURT OF APPEALS

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 528

Johnson, Drake & Piper, Incorporated,
Appellant,

vs.

State of New York,
Respondent.

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(528) Charles B. Molineaux, Jr., & Arthur Karger, NY City for appellant.

Louis J. Lefkowitz, Attorney-General (Richard J. Dorsey & Ruth Kessler Toch of counsel) for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

Appellant's right, if any, to damages for claimed overruns in the pile foundation work and in consequence of claimed delays in the work depends on the determination of mixed questions of fact and law to be resolved on the basis of the evidentiary facts established and the inferences fairly to be drawn from such facts. The same is true with respect to the assertions of liability based on alleged misrepresentations of the State affecting the pile foundation

Appendix A, Decision of Court of Appeals, State of New York.

work (including alleged bad faith on the part of the State) and as to the scope of cofferdam work. These issues were resolved, expressly or by necessary implication, in favor of the State by the Court of Claims and such resolutions were later affirmed at the Appellate Division. As such, there being evidence in the record for their support, they are now beyond the scope of our review. We agree with the Appellate Division that, in the light of the express qualifications on its use stated by the trial judge, the court was entitled to utilize the claim analysis prepared by the State's project designer and consultant to the extent that it deemed justified in reaching its decision.

• • • • • •

Order affirmed, with costs, in a memorandum. All concur.

Decided November 15, 1977

Appendix B, Decision of Appellate Division, Third Department, Supreme Court, State of New York.

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

September 11, 1975 25559

JOHNSON, DRAKE & PIPER, INCORPORATED,

Appellant,

v.

STATE OF NEW YORK, Respondent.
(Claim No. 48874.)

Appeal by claimant from a judgment of the Court of Claims, entered October 24, 1974, which dismissed causes of action First through Sixth of the claim herein, except for certain awards made with respect to parts of the Second, Fourth and Fifth causes of action totalling $16,657.07, interest thereon and interest on the amount of the previously severed Seventh cause of action.

In the fall of 1961, claimant entered into a contract with the State of New York for the construction of a portion of the new Van Wyck Expressway and its interchange with the existing Long Island Expressway. Included in the work specifications were the erection of an elevated viaduct on bridge piers to cross over the Long Island Expressway and the construction of various ramps, service roads and drainage lines, and claimant completed the project to the apparent satisfaction of the State. On this appeal, however, claimant contends that the State increased the cost of completion through various breaches

and, therefore, it seeks monies in addition to the amounts set forth in the itemized contract payment schedules.

Although numerous grounds for additional payments were asserted in the lower court, here claimant focuses principally on only three, namely: that the work specifications misrepresented the depths to which piles supporting the bridge piers would have to be driven; that the State implied that the necessary cofferdams could be built at a cost of $176,000 by refusing to accept bids therefor in excess of that amount; and that the State unreasonably ordered acceleration of the construction, thereby disrupting the sequence of the work and increasing its cost.

With regard to the depths to which the piles were ultimately driven, there were concededly substantial overruns from the work specifications. However, claimant has already been compensated for the increased footage at the unit price of $4.50 per foot as provided in the contract. Moreover, prior to the submission of its bid, claimant made only the most cursory examination of the project site and of information relative thereto readily available from the State and, thus, exhibited an attitude of complete indifference towards its contractual obligation to base its proposal upon information gained from "personal investigation and research and not from the estimate of records" of the State (cf. *Johnson, Drake & Piper* v. *State of New York*, 31 A D 2d 980; *Johnson, Drake & Piper* v. *N. Y. State Thruway Auth.*, 22 A D 2d 321). As for the use of the dynamic formula technique for determining the depths to which the piles were to be driven, claimant was put on notice by the work specifications that this technique was to be utilized and, consequently, even if its use did result in longer piles than would static load tests, claimant's bid should have been adjusted accordingly.

The remaining grounds for relief relied upon by claimant are likewise without merit. Assuming *arguendo* that the State did imply that the cofferdams could be built for $176,000, claimant did not prove that construction at such a cost was impossible, and, furthermore, there is ample support in the record for the lower court's decision that claimant's own errors in cofferdam design, especially its selection of inadequate sheeting, caused the lost time and unanticipated costs of dam construction. Similarly, in its attempt to accelerate the work, the State was merely seeking the completion of the project on the agreed upon date and, again, numerous instances in the record support the lower court's determination that the delays and the need to accelerate were the fault of claimant.

Finally, we would note that, as trier of both the law and the facts, the lower court was entitled to rely upon the claim analysis prepared by the State's project designer and consultant, Tippetts-Abbett-McCarthy-Stratten, to the extent that it deemed justified in reaching its decision, and it specifically informed the attorneys for both parties on the record that it would disregard any objectionable material contained therein.

Judgment affirmed, with costs.

GREENBLOTT, J.P., SWEENEY, KANE, MAIN and REYNOLDS, JJ., concur.

Appendix C, Decision of Court of Claims, State of New York.

DECISION

STATE OF NEW YORK : COURT OF CLAIMS

CLAIM No. 48874

DECISION

JOHNSON, DRAKE and PIPER, INC.,

Claimant,

—against—

THE STATE OF NEW YORK,

Defendant.

APPEARANCES:

For the Claimant:
Norton, Sacks, Molineaux, & Pastore, Esqs.,
by Charles B. Molineaux, Esq.,
of Counsel

For the State:
The Honorable Louis J. Lefkowitz,
Attorney General, by J. Joseph Murphy
and Joseph T. Hopkins, Assistant Attorneys
General, of Counsel

ORLANDO, J.

The above-entitled action duly came on for trial at a term of this Court held at the Court of Claims, 270 Broadway, New York. The Claimant and the State appeared by Counsel, as noted above. The Court, having heard all the proofs of the parties and the arguments of Counsel, and the case having been finally submitted to the Court and due deliberation having been had, finds and decides as follows:

Appendix C, Decision of Court of Claims, State of New York.

The claim was duly and timely filed with the Clerk of the Court of Claims and with the Attorney General on November 3, 1967. With a single exception, it has not been assigned or submitted to any other officer, Court or tribunal for audit or determination. The sole exception is an assignment of monies concededly due and paid to the Northwestern National Bank of Minneapolis by order of Court of Claims Judge Alexander Del Giorno dated December 21, 1967. The claim of the Northwestern National Bank of Minneapolis was dismissed on the ground that the bank was not a necessary or proper party.

Seven Causes of Action were alleged in the claim and the total amount for which judgment was originally sought was $4,895,899.02. In its Proposed Conclusions of Law the Claimant sets forth damages in the sum of $3,921,510.70 and interest.

On December 20, 1967, an order was filed severing the Claim and awarding to the Claimant for the Seventh Cause of Action in the sum of $294,401.39 and further awarding the Claimant the return of bonds having a par value of $66,000. The question of interest, if any, on the sum and bonds involved in the Seventh Cause of Action was deferred until the determination of the balance of the claim and the remaining Causes of Action.

The claim arises from alleged breaches of contract known as FAVWE 61-3 and FIHHE 61-1, which was entered into on October 31, 1961 by the Claimant and the Department of Public Works (now known as the Department of Transportation) of the State of New York. The contract called for the construction of an interchange of two arterial highways, Van Wyck Expressway and the Long Island Expressway, the former requiring the construction of an elevated portion of the Van Wyck Expressway Extension on bridge piers (41 piers for approximately ⅗ of a mile), construction of four ramps (also on piers) and construction of

ramps on ground level; and of a portion of Interstate Route Connection 514. The construction included, but was not limited to, foundation work, driving of piles, erection of structural steel for the roadway, concrete paving, service road, access ramps, retaining walls and sewers, relocation of a road, park roads, drainage and waterline.

The contracted project was designed for the State, and its construction was supervised, by the private engineering and consulting firm of Tippetts-Abbett-McCarthy-Stratton (TAMS). In January 1959, design work for the project was begun as part of a feasibility study contract between TAMS and the Triboro Bridge and Tunnel Authority. In April 1960 TAMS entered into a new contract with the State for the design and preparation of the documents for Contracts FAVWE 61-3 and FIHHE 61-1.

The First Cause of Action, the basic and major cause from which the others proliferate, alleges a Contract, dated October 30, 1961, between the State and the Claimant, the performance by the Claimant of all the terms and conditions of the Contract . . . "as well as certain other work which it was directed to perform . . .", the acceptance by the State, on August 13, 1964, of the Contract as performed, and the receipt by the Claimant on or about August 30, 1967 of the Final Agreement and Final Estimate.

The First Cause alleges that:

> "The within claim is for the increased cost, expense, and damage incurred by Johnson in the performance of the work under the said contract occasioned by the acts, faults, errors and omissions of the State of New York, its agents, representatives, servants and/or employees, for extra and additional work done in connection with the said contract, for damages, for breach of said contract and for work done under said contract" (Ninth Paragraph)

The First Cause further alleges that:

> "The contract, among other things expressly represented and warranted and made statements concerning conditions as to the physical character of the soil at the site of construction, the type of piles necessary, the method of driving said piles, the expected length of said piles, construction of required cofferdams, and that fills could be placed without disturbance to the existing river bottom, which representations, warranties and statements Johnson properly relied upon in the preparation and submission of its bid". (Tenth Paragraph)

The State's Demand for Bill of Particulars sought to have the Claimant "set forth in haec verba each and every representation, warranty and statement . . ." in respect of the details of the allegation.

The Claimant's Verified Bill of Particulars (Paragraph 3 (1) through 3 (6)) is not responsive to this demand. The response makes repeated general references to the Contract Proposal (236 pages), the boring logs, and the Contract Drawings (301 plates). In Paragraph 3 (2) it refers to "Contract Documents", "its analysis of all the contract documents" and "contract representations". Had the Claimant's Verified Bill of Particulars set forth in haec verba, each representation, warranty and statement, as required by the Demand for a Bill of Particulars, this Court would not be put to speculating whether any representation, warranty or statement can possibly be inferred from a reading of the boring logs and Contract Drawings. The Claimant has failed to do so. The burden of a responsive presentation of such material in a form intelligible to the Court should have been but was not borne by the Claimant. Representations, warranties or statements cannot be inferred from linguistic nuances.

Appendix C, Decision of Court of Claims, State of New York.

The Eleventh Paragraph of the First Cause of Action alleges that the Claimant encountered materially different soil conditions from those represented or warranted and that, because of such conditions, ". . . and the directives, acts, faults, delays, errors and omissions of the State . . . the performance of pile driving and foundation work under the contract was disrupted and rendered more expensive than contemplated or intended by the contract . . ."

The Claimant's Verified Bill of Particulars (Page 4, Paragraph 4, to Page 10) repeats but fails to particularize the general language of the claim that "soil conditions encountered by Johnson, Drake and Piper were materially different from those represented by the State and contemplated by the parties . . ."

The Contract Proposal deals admonitorily and specifically with the nature and extent of the contract's responsibilities. (Special Foundation Notes, Pages 29 through 31). The contractor's

> "Special attention is directed to the effect of special subsurface conditions on the contruction operations. Any work required to support or to assist the handling of equipment, forms, etc., due to the special subsurface conditions shall be included in the unit price bid for the appropriate items . . . the contractor's attention, however, is called to the fact that the information obtained therefrom (the opinions of the Department's Engineers relative to the Foundation conditions) is not to be considered as a substitute for personal investigation and research by the contractor as required by Paragraph 3 of the contract agreement . . . In the event that subsurface conditions vary from those shown by the explorations, the contractor will still be required to establish the foundations to the necessary load-carrying capacities as directed by the Engineer" (Page 30, 31).

Appendix C, Decision of Court of Claims, State of New York.

The Claimant's Project Engineer, Calvin L. Zemsky, testified under cross-examination that he had not examined the organic silt, and that the Claimant had received a copy of the State's boring logs of core samples which were taken from the earth at different levels. He knew that those samples were available to prospective bidders.

The Claimant was clearly indifferent to the responsibilities and obligations it had assumed under the Contract Proposals. Relevant portions of Zemsky's cross-examination follow:

> Q. . . . Now did you secure any boring information from the Babylon Office?
>
> A. Not personally, but the company secured it.
>
> Q. And just what information, to your knowledge, did they secure?
>
> A. Well, there was a set of boring sheets that came down from either District 10 or Albany. I don't know where, but they came down with the set of plans or immediately after that to the bid room.
>
> Q. Do you have any personal knowledge as to how that information was acquired?
>
> A. No, sir.
>
> • • •
>
> Q. . . . But you made no personal investigation in either Babylon or in the Albany Office?
>
> A. No, sir.
>
> The Court: No personal investigation as to what? As to borings?
>
> Q. Of the borings, or of the boring or of soils information?
>
> A. No, sir.
>
> • • •
>
> Q. Did you make any inquiry from what we call TAMS Soils Department.

Mr. Murphy: By TAMS, your honor, I mean Tippetts-Abbett-McCarthy-Stratton.

The Court: I understand.

Q. Did you make any inquiry as to their department as to what information they had?

A. No, sir.

Q. To your knowledge did anyone from your company make any such inquiry?

A. Not that I know of.

Q. And you are aware that the State of New York has a rather extensive soils department, are you not, down in Albany?

A. I know they have the department, as to how extensive it is I have no knowledge.

Q. You made no inquiries as to subsoil conditions at that department?

A. No, sir.

Q. Did you know whether anyone from Johnson, Drake & Piper did?

A. Not that I know of.

Q. Did you consult with any private consultants as to soils conditions?

A. No, sir.

(Transcript, Vol. V, Pages 30 through 33)

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Q. Mr. Zemsky, this morning we were talking about pile driving, examination of soils. Remember? I asked you whether or not you examined this organic silt by squeezing it and I think your answer was no, you hadn't. Whatever it was, you were aware, and I think you received, through someone else in your organization, a copy of the boring logs, did you not, prepared by the State?

A. Yes, sir.

Q. And you were aware, were you not, that when those boring logs were taken core samples were taken from the earth at different levels and recorded on the boring logs?

A. Yes.

Q. And you realize, do you not, that those samples are available for prospective bidders and you were so advised by the Proposal?

A. It is in the Proposal that they are.

Q. Did you or anyone of your organization go to Babylon to examine these core samples or any place else?

A. I did not go, and as far as I know no one from the organization went.

(Transcript, Vol. V, Pages 92, 93)

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Q. Now I believe you testified you reviewed the borings on this job? Is that correct?

A. Well, it is a question what you mean by reviewed. I looked at the borings on the job.

Q. Did you have occasion to use them in the field, to compare what you found in the field as to what the borings showed?

A. We had the borings in the field and—we looked at them but didn't make a detailed study between the borings and the actual field condition.

(Transcript, Vol. V, Page 144)

The Claimant had been informed that:

"Subsurface explorations have been made for this project at locations indicated on the Plans. The records of these explorations are available to bidders for their expection at the office of the District Engineer, District No. 10, Babylon, L. I New York, and at the

office of the Deputy Chief Engineer—Bridges, Grade Separations and Structures, Albany, New York. Samples of the material encountered, where samples have been taken, may be inspected at the District Office. The foundation designs for this project have been selected after due study and deliberation of the results of the subsurface explorations" (Special Foundation Notes, Contract Proposal, Page 29)

The claimant had been advised that the State anticipated certain types of subsurface materials would be encountered in the construction area. These materials were described as:

(1) a layer of miscellaneous fill varying from about 5 to 40 feet in thickness below the ground surface. This fill may consist of sand, silt, cinder, brick, wood, etc. There is little or no miscellaneous fill, however, in a narrow bank along the banks of the Flushing River.

(2) A stratum of organic silt or peat under the miscellaneous fill or below the bottom of the Flushing River. The thickness of this stratum varies within the wide limits. It extends as much as 70 to 80 feet below ground surface in some locations, while little or no organic silt may be found in the area of relatively higher ground along the easterly boundary of the project area.

(3) A sand and silt deposit under the organic silt. No bedrock was encountered within the depth of borings made for this project. (Special Foundation Notes, Contract Proposal, Page 29)

In an earlier case, the same Claimant against the New York State Thruway Authority (22 AD 2nd 321), the

Court said:

"The bidder was adequately warned that the information to be obtained in connection with the site and its environment and the conditions affecting the work were to be secured by personal investigation and research and that there was to be no exclusive reliance on estimates or records of the State or the Authority. The contractor was informed that there were records of subsurface explorations available for review by interested parties, but it did not look at them. It made no inquiry about possibility of the presence of sand and did not examine the State's boring of the area although they were available. The claimant's representatives did not see what they should have seen and made little or no effort to take advantage of the State's data about the site. Their entire investigation was casual, cursory and inadequate. The trial court properly determined that the contractor's investigation was not conducted with reasonable care for if it had been it would have been obvious that there was sand on the bottom of the face, gravel and sand mixture in the middle of the face and gravel on top of the open face. 'The claimant saw fit to make its bid without resort to these common and simple safeguards. It may not now secure from the court an alteration of its contract as a substitute for the care and prudence with which the business man of average caution would exercise in serious undertakings'. (Niewenhous Co. v. State of New York, 248 App. Div. 658, 659)."

The alleged increases in cost to the Claimant under the First Cause of Action, all allegedly "without fault on its part" (Par. 12) are set forth in *Schedules A through I*, attached to the claim, in the total amount of $2,414,230.06.

Schedule A claims increased cost ($73,601.81) because Claimant used steel sheeting for certain piers (ML-13 NB, ML-16 NB, ML-21 NB, ML-28 SB) whose conditions, as represented by the contract, would have permitted the use of wood sheeting.

Page 125 of the Contract Proposal, under Item 83 X states that the relevant general specifications for Temporary Sheet piling apply. It states, in part:

> "The contratcor, at his option, may use either timber or steel piling or H-Section steel piles of adequate cross section and length with timber plank interpile sheeting".

The choice of construction methods or materials was the Claimant's sole responsibility. The Claimant's use of wood sheeting showed a disregard of the conditions indicated in the Contract Documents and either inadequate or no pre-bid investigation of the site.

Schedule B claims additional cost ($77,680.61) in removing excessive excavation materials and stabilizing pier excavations at proper elevations.

The Claimant's pier excavation to reduce excessive heave, before and after pile driving, should have been within sheeted excavation to a sufficient depth below the bottom of the excavation. The responsibiilty, under the contract for designing and providing adequate temporary sheeting and bracing, rested with the Claimant and it was not required to submit its design for review by the Engineer. The Claimant chose to over-excavate to remove excessive heave rather than to provide adequate sheeting as indicated by the terms of the contract. On-site observation and evaluations of soil conditions would have forewarned the Claimant against such error.

The claim for increased cost for the stabilization of the subsoil, of the pier subgrade, is governed by Page 30

of the Contract Proposal which states, in part:

> "Special attention is directed to the effect of special subsurface conditions on the construction operations. Any work required to support or to assist the handling of equipment, forms, etc. due to the special subsurface conditions shall be included in the unit price bid for the appropriate items".

The cost of stabilizing the subgrade was part of the Claimant's contractual obligation and the cost should have been included in the bid price of the appropriated items.

Schedule C claims increased cost ($964,647.60) in respect of driving cast-in-place piles. This claim arises from the Claimant's inaccurate evaluation of the existing soil condition about which it was forewarned in the boring logs and on Page 29-31 of the Special Foundation Notes of the Contract Proposal.

The subsurface conditions indicated an indefinite length of piles to be driven. The Claimant, nevertheless, chose for use a pile which is more costly according to its allegation, when driven to a length in excess of 80 feet. The total driven length of closed end cast-in-place concrete piles, found acceptable and paid for in the Final Estimate was 357,395 feet, an increase in driven length of approximately 25% above the estimated quantity.

The presence of obstructions during pile driving and the method for payment for the removal of these obstructions are dealt with as a responsibility of the Claimant on Page 30 of the Contract Proposal.

The claim for payment costs due to delays incurred by subcontractor Raymond International, Inc., is unfounded inasmuch as the delays occurred primarily because of a lack of coordination between the Claimant and its subcontractor and also because the improperly designed coffer-

dams failed when pile driving equipment was placed on their perimeter.

Schedule D, claiming additional cost ($885,903.60) for the construction and excavation of temporary cofferdams (Item 82S), in the course of bridge pier construction along the Flushing River, is predicated on soil conditions encountered which were, allegedly, materially different from those indicated in the contract.

The Claimant alleges that the soil conditions encountered made it impossible to construct cofferdams without driving long heavy section steel sheet piling into firm subsurface material; that increased cost was incurred because of the addtional time required to drive sheeting and to excavate material; that there was the necessity for a greater quantity and heavier and longer section of steel sheeting and for furnishing additional equipment to drive and extract the piling and the increased incident of damaged and cut sheeting.

The Claimant was adequately forewarned of the subsurface conditions in the Special Foundation Notes of the Contract Proposal, Page 29. The Claimant was further forewarned that certain specified locations would require the use of surcharge to stabilize and consolidate compressible material and that the surcharge material was not to be removed without the direction of the Engineer. Other references to poor foundation materials can be found in the Contract Proposal.

The design and the execution of cofferdams as a way of providing dewatered conditions for the construction of various foundations shown on the plan was left to the judgment of the contractor. It was allowed by the Contract Proposal (Page 124, Item 82S) to suggest any other means of accomplishing the result which would be acceptable to the Engineer. The Claimant's attempt to con-

struct cofferdams of wood sheeting and AP3 steel sheeting failed. A Z-type sheeting finally prevailed.

Nothing in the record would justify the Claimant's allegation that the contract implied which cofferdam sheeting was indicated in the contract drawings. On the contrary, the Contract Proposal (Page 124) states that Public Works Specifications, Item 82 (Page 369), apply, as follows:

> "Cofferdams may be constructed of earth, earth-filled bags, sheet piling or any other materials which the Contractor may elect to use. The foundations shall be placed with the cofferdams in an unwatered condition, unless otherwise indicated on the plans. Unwatering equipment and any necessary bracing shall be of adequate quality and capacity and shall be so arranged as to permit their proper functioning in connection with the cofferdams".

On the subject of payment, the Contract Proposal (Page 124) provided:

> "where the cofferdams are so indicated no separate payment will be made for temporary sheeting in the respective locations".

The claimant bore sole responsibility for the selection of the wood sheeting and the AP3 steel sheeting which resulted in the cofferdam failures (at ML-12SB, ML-13SB, ML-14 NB, ML-14SB, ML-22NB, ML-23NB and ML-27SB).

The cofferdams failures were, in turn responsible for the retardation in the Progress Schedule of the pile-driving operations as pointed out in a letter from TAMS to the District Engineer's Office dated September 20, 1962.

The Schedule D claim for excavation cost in the sum of $104,929.13 (which included $28,614.09 for truck and dump

charges and $52,643.62 for direct labor charges) is predicated on the claimant's failure to design and construct adequate cofferdams to cope with the condition of organic silt. Forewarning was given to the claimant of this condition in the Special Foundations Notes of the Contract Proposal (Page 29). The claimant bore responsibility for the disposal of the excavation material away from the site in accordance with the provision on Page 49 of the Contract Proposal that:

> ". . . all materials excavated under Item 5S, Trench, Culvert and Bridge Excavation shall become the property of the Contractor and shall be disposed of away from the site."

The effective date of the Contract was October 31, 1961 and the date of completion was within 24 months of that date. The Progress Schedule, dated November 28, 1961, required piles to be driven beginning December 1961 and to be completed by December 1962. There was no specific indication in the Progress Schedule of a completion date for cofferdams, but, as a practical matter, they had to be constructed sometime before the piles could be driven. Work began on the cofferdams on June 4, 1962, a loss of approximately 7 months of the 24 months allowed for the completion of the entire contract.

On June 4, 1962 the Contractor commenced, and on June 18, 1962, completed construction of cofferdam ML-12SB of wood sheeting. As a result of the load of the pile rig, the wood sheeting shifted and more than 5 feet of heave occurred during the pile-driving operations. An attempt, between August 27, 1962 and August 29, 1962 to repair the cofferdam failed. The cofferdam was rebuilt of steel sheeting between February 25, 1963 and March 25, 1963.

Cofferdam ML-13SB was constructed of AP-3 steel sheeting between June 4, and June 11, 1962. Efforts to save it, between June 11 and September 5, 1962 were unavailing. It was dismantled and reconstructed of heavier ZP steel sheeting between December 14, 1962 and February 1, 1963.

Cofferdam ML-14N and SB was constructed of AP-3 steel sheeting between July 24, 1962 and August 11, 1962. When efforts to save it, between August 1, 1962 and September 5, 1962, failed, it was dismantled and reconstructed of ZP steel sheeting between January 30, 1963 and April 2, 1963.

Cofferdam ML-27SB was constructed of wood sheeting between July 3, 1962 and July 12, 1962. It was salvaged November 16, 1962 after intermittent repairs, which were required because the sheeting had shifted under imposed loads.

Cofferdam ML-22NB was constructed of wood sheeting between August 16, 1962 and September 5, 1962 and partially reconstructed of AP-3 steel sheeting between September 5, 1962 and October 25, 1962.

Cofferdam ML-23NB was constructed of wood sheeting between August 13 and August 22, 1962. A portion of it which failed was replaced by AP-3 steel sheeting between November 19 and November 26, 1962. Cofferdam HD—Pier 9 was constructed on September 14, 1962 of Z-type sheeting of 40-foot lengths but was found to be inadequate. Longer sheeting proved to be acceptable for this and for the remaining cofferdams.

The Claimant defaulted in its plainly defined responsibilities under the Contract Proposal and Public Works Specifications in respect of the cofferdams. It failed to start work on the cofferdams until approximately 7 months had elapsed from the date of the signing of the Contract. The cofferdam failures were responsible for the removal

from th job-site of two pile driving rigs. The consequences of overall delay in pile driving, footing, column and column cap concrete work and steel work construction were an increase in overall cost. The Claimant having fallen far behind in his Progress schedule, incurred the increased expense of additional sheeting and bracing, hiring additional personnel and providing additional sites for the pile subcontractor, in attempting to meet the contract completion deadline. The additional cost for the removal and replacement of damaged sheeting for new sheeting and for the excavation of heave resulted from the Claimant's erroneous choice of wood sheeting and AP-3 steel sheeting. Had the Claimant used the Z-type sheeting of correct size from the inception of the cofferdam construction, had they done so timely instead of delaying 7 months, the chain of costly misadventure would not have been forged.

The Claimant has not submitted any evidence of the actual cost they might have incurred had they chosen to use the correct size Z-type sheeting from the inception of the cofferdam construction, or of the quantity of such sheeting that might have been required. No evidence was adduced of the amount of the difference, if any, between such cost and the allowable maximum of $176,000 for cofferdams. The temporary Z-type sheeting might have been economically reused by the Claimant had the Claimant made the choice in the first place. Their late use when the Claimant was lagging badly precluded such reuse.

The Claimant's Brief After Trial (Page 124) states:

> "As to the cofferdams, the very fact of the gross disparity between the State's represented cost and the actual cost incurred by Claimants demonstrates how qualitatively different the scope of work required was from the work contractually indicated. Quantum meruit clearly applies without further discussion".

The Court rejects the argument that the size of the disparity between the work contractually required and the actual cost incurred demonstrates a qualitative difference. The difference, far from demonstrating a qualitative difference, is, in the judgment of the Court, persuasive evidence of the Claimant's careless and wasteful performance and conduct of the project. To find liability in the State is to exculpate the Claimant and its subcontractors and to reward them for their ineptitude.

> "One who makes a contract cannot be certain that he will be able to do the work for the amount of his bid. The risk of failure falls on his shoulders. Equity does not relieve from bargains merely because they are unprofitable". *Weston* v. *State*, 262 N.Y. at P.51

Schedule E claims additional cost ($33,856.84) incurred in the removal of mud waves. This Schedule is based upon the allegation in the Claim (Paragraph 10) of express representations, warranties and statements ". . . that fills could be placed without disturbances to the existing river bottom . . .", and that the Claimant ". . . encountered materially different soil conditions . . ." which required ". . . the use of additional equipment, labor and material . . ." (Paragraph 11).

In response to the Demand for a Verified Bill of Particulars to "set forth in haec verba each and every representation, warranty and statement concerning . . . (6) that fills could be placed without disturbances to the existing river bottom" The Claimant, in its Verified Bill of Particulars, replied (Paragraph 3 Sub. 6): "Sheets 37, 38 and 44 of the Contract Drawings show that fill is to be placed in and along the banks of the Flushing River with no warnings as to mud waves, heaves or other disturbances being noted". While the indicated Contract Drawings indicate

that fill is to be placed in and along the banks of the Flushing River neither these or any other Contract Drawings contain "warnings".

The absence of a "warning" cannot be deemed a representation, warranty or statement, where the State has afforded the Contractor ample opportunity to examine the State's records and the Contractor has not availed itself of the opportunity or where the Contract Documents, as here, contain adequate admonitory language.

The Contract Proposal and Public Works Specifications were sufficiently explicit for a Contractor of size, standing and longtime expertise to have been forewarned that the rapid placement of heavy embankments, and the use of heavy tractors to move the material, on a deep substratum of organic silt, would probably cause mud waves. The contractor could have chosen lighter construction equipment and a thin blanket of fill and allowed a full day for the organic silt to regain its strength.

The Claimant began to place temporary fill in the Flushing River in June 1962 as a means of facilitating the construction of cofferdams. The temporary alteration of the bounds of the Flushing River was a measure of convenience for such construction and the mud waves were a concomitant of the Claimant's ill-chosen construction methods.

Schedule F claims additional cost ($49,899.23) incurred in the pumping of water. The Demand for a Verified Bill of Particulars (Paragraph 5) sought to have the Claimant ". . . state where and when the water was pumped for which claim is made . . ." The Verified Bill of Particulars (Paragraph 5G) states:

> "The water was pumped from various excavations made for piers and drainage throughout the area of the contract between November, 1961 and January 14, 1963".

One and one-half pages (pp. 14, 15) containing dates follow. Locations are omitted.

In one of its Proposed Findings of Fact (No. 334) the Claimant states:

> "The State's audit verified that claimant incurred additional costs in the performance of pumping the water prior to January 15, 1963 in the amount (after overhead and profit have been added) of $49,463.46 (Exhibit T)".

The Audit (Schedule 1F) said:

> ". . . auditors have not been able to estimate from the bid estimate the contemplated pumping costs nor has the claimant's representative, Mr. Eimen, enlightened auditors as to where such costs were included in bid estimate.
>
> Auditors have therefore transferred actual audited costs to 'No Audit Determination' inasmuch as *contemplated cost could not be verified by auditors*". (Emphasis added).
>
> "Claimant did not submit any equipment logs or records to reflect which pumps were used on a daily or weekly basis. Claimant did submit an inventory equipment record which reflected equipment owned, and in certain instances, the job location thereof. Some 'Equipment Transferred Reports' were also submitted which reflected the transfer of equipment from one job to another. However, from the records submitted, auditors could verify only that the equipment (pumps) claimed as owned equipment, was owned by the company. *Auditors could not verify which pumps were used and when they were used, nor could auditors verify that all the pumps claimed were on the job site for the period claimed as used . . .*" (Emphasis added)

The Claimant was forewarned by the Contract Proposal of the presence of ground water (Page 30):

> "The Contractor's attention is directed to the necessity of recognizing the elevation of ground water so that he will progress his work with full knowledge of water being present. Any cost involved in keeping the site free from water shall be included in the price bid for the appropriate items for the required work except as otherwise noted".

The Claimant was informed by the Public Works Specifications (Page 207, Item 5, Trench, Culvert and Bridge Excavation) that the cost of dewatering was to be included in the price bid for Item 5 and that he was obliged to "keep the site of the work free from earth, water, snow and ice during construction . . ." A similar instruction was repeated in respect of cofferdams with the added advice that "unwatering equipment and any necessary bracing shall be of adequate quality and capacity and shall be so arranged as to permit their proper functioning in connection with the cofferdams" (Page 369, Item 32S, Cofferdams). The Claimant's failure, in respect of cofferdams, was responsible in a good measure for the increased cost incurred in dewatering, a failure which might have been avoided by the use of Z-type steel sheeting of sufficient depth.

The dewatering of piers where no sheeting had been installed to stabilize the open excavation (ML-Piers-1N&S, 2N&S, 3N&S, 4N&S, 5N&S, 6S, 7S, ML-Abutment; Ramp HB-Piers 2 & 7, Ramp HC-Piers 9, 10, 11, 12, 13 and 16) should have been considered by the Claimant in calculating its bid.

The Claimant's drawing (#C-1, November 28, 1961, "Plan of Construction work in Flushing River") for the control of the water level in Flushing River, was approved

by the World's Fair Corporation (Permit M-20, December 18, 1961). The drawing provided for the installation of a 36″ corrugated metal pipe at an invert elevation of —4.00 ft. in both upstream and downstream dams which were to be constructed by the Claimant in the Flushing River. Temporary haul roads were to be constructed over the dams with an elevation of +2.0 ft.

The Claimant constructed earth and brick dikes but omitted the pipes. The dikes failed, the project site was flooded, and the resulting mud waves checked the water flow downstream and caused it to back up. In June 1962, the Claimant installed a 30′ corrugated metal pipe for the diversion of the river. The lack of control of the Flushing River level was a result of the Claimant's failure to adhere to its own approved Drawing #C-1 of November 28, 1961. The failure accounted for the additional cost incurred under this Schedule. The flooding of the project site occurred because the Claimant failed to install drainage pipes under the earth dikes. The later installation of 30′ corrugated metal pipes proved inadequate for the proper flow of the river.

In November 1962 the Claimant installed a 48′ pipe. The problem remained unsolved because the 48′ pipe had not been placed at the proper elevation. On April 2, 1963 the State advised the New York Department of Parks that the water had been lowered to an acceptable level.

Schedule G claims additional cost ($179,951.34) was incurred in the removal of obstructions to the pile driving, such as timber piles, concrete boulders, etc., which were not indicated in the Contract Documents. The Demand for a Verified Bill of Particulars required the Claimant to "give the location and describe the obstructions which were removed and the date of their removal . . ." (Paragraph 5). The locations and approximate dates of removal are set forth in the Verified Bill of Particulars (Pages 15-17).

The Claimant states that the various obstructions which it encountered were "contrary to the representation contained in the Contract". In what way or what representations is not stated. Nor does the Verified Bill of Particulars state that these obstructions were 10 or more feet below subgrade, a fact which would make the claim payable as force account work.

The words of the Contract Proposal on the subject follow:

> "If any obstructions to pile driving are encountered, ten (10) feet or less from the bottom of the footing, the Contractor shall, if so ordered by the Engineer, pull the partially driven pile or piles and remove the obstruction, backfilling hole with approved suitable material and thoroughly compacting backfill to the satisfaction of the Engineer. However, no partially driven pile shall be removed until the Engineer is satisfied that the Contractor has made every effort to drive the pile through the obstruction. Payment will be made for excavation under Item 5S and for sheeting under the appropriate item; no other extra payment will be made for this work". (Page 30)

Other provisions of the Contract Documents are applicable. Special Foundation Notes of the Contract Proposal (Page 31) call attention ". . . to the fact that the information obtained therefrom is not to be considered as a substitute for personal investigation and research by the Contractor as required by Paragraph 3 of the Contract Agreement".

The Contract Proposal (Item 81S, Page 123) provides a linear foot formula of payment for demolition of existing piles and cradle. It provides for payment of excavation

under Item 5S, Trench, Culvert and Bridge excavation within the limits indicated on the plans.

The Contract Proposal (Item 84TP, Page 172) provides a linear foot formula of payment for the Removal of Tops of Existing Timber Piles. The quantity paid for is the actual number of linear feet of pile removed or demolished. The unit price bid covers the cost of furnishing all labor, material and equipment to complete the excavation and removal.

The Contract Proposal (Item 85 CO, Cast-in-Place Concrete Piles, Open-End, Page 128) states:

> "Wherever abandoned underground structures are encountered 10 feet or less at the bottom of the proposed pile caps the engineer may direct removal of part or all such structures and backfilling with approved suitable material. The Contractor shall perform the work in accordance with such direction. Excavation shall be performed and paid for under Item 5S; furnishing and placing sheeting material for back-fill under Item 2EF-B. No other payment will be made for work incidental to encountering and removing abandoned underground structures".

The Contract Proposal (Item 103D, Page 135) requires the Contractor to remove existing drainage structures as indicated on the plans and as directed by the engineer. The Contractor is required to remove pilings in accordance with the requirements for Item 84 TP (supra). Disposal must be away from the site. Back-fill must be performed with materials conforming to the requirements of Item 2 EF-B on selected fill. The methods of payment are precisely described under Contract Proposal Items 84 TP, 5S and 2EF-B.

Contract Drawings 53.60 and 199 of the Contract Plans

indicate that the removal of potential obstructions, existing timber piles and concrete caps were a responsibility of the Contractor and that their removal, within the purview of Item 851D, were included for payment under Item 5S.

The greater part of the claim under Schedule G seeks $146,355.68 for the cost of excavation and removal of obstructions at ML-25 NB & HC-6. The Claimant subsequently reduced the amount to $122,729.46.

Payment by the State to the Claimant for removing obstructions was made under the following force accounts:

1) New Item 904 A	(ML-25 NB & HC-6)	$69,013.83
2) New Item 918	(ML-Pier 19)	936.64
3) New Item 924	(ML-Pier 18 SB)	7,995.19

Payment was made under Item 5S for the removal of a 48 inch water-main at Piers HC-9, HC-10, HC-12 and HC-13. (Page 1635, Final Estimate). The claim for additional payment for removing obstructions in 18 piers was included under Item 5S.

Schedule H claims additional cost ($39,642.14) incurred in the construction of additional pile cap forms (Paragraph 12). The Demand for a Verified Bill of Particulars requires that the claimant "give the location by station or otherwise describe the additional pile cap forms which were constructed". The Verified Bill of Particulars alleges that pile cap forms were required at 57 designated pier locations. The need for such forms occurred because the soil conditions encountered were allegedly different from those which the Claimant stated had been represented in the contract. The Claimant alleges that it had to do form work not contemplated originally thereby incurring increased cost in the construction of additional pile cap forms.

The Claimant alleges that pile cap forms were required at the designated pier locations "where it was originally contemplated that sheeting would be driven on the neat line of the footings thus eliminating the necessity for forms". (Verified Bill of Particulars, Page 41).

The Claimant, in its Proposed Findings of Fact (No. 358), alleges that "these additional costs were incurred by the Claimant because of misrepresentation, fraud and active interferences of the State". No evidence was adduced to support the Proposed Finding.

In its Proposed Findings of Fact (No. 359) the Claimant states that "The State's audit verified that claimant incurred additional costs in the construction of additional pile cap forms in the sum (after overhead and profit had been added) of $37,114.10".

An audit is not a determination of legal liability. The State's auditors, in their letter dated September 1, 1972, transmitting the Audit to the Assistant Attorney General, wrote:

> "The audit was performed for the primary purpose of determining whether the claimant's records and supporting data substantiated the amount scheduled in the claim. It is not within the scope of our audit to make any judgment concerning (1) *the legality of the entire claim or any portion thereof*, and (2) the engineering aspects of claim". (Emphasis added) (Exhibit T).

Schedule I of the claim, brought by the claimant in behalf of its subcontractor, Bar Steel Construction Corporation, seeks the amount of the increased costs ($109,046.88) of placing steel for piles, caps, footings and columns to April 9, 1963.

> ". . . because, inter alia, of non-sequential, interrupted and piece-meal work as a result of the founda-

tion conditions; performance of work under more difficult field conditions, including winter weather; performance of certain work, including cutting and welding in the field, which would have been performed more efficiently in the shop". (Verified Bill of Particulars, Page 17).

Bar Steel Construction Corporation entered into a subcontract with the Claimant on November 7, 1961 requiring the contractor to furnish a quantity of bar reinforcements for structures For Trucks Job-site "at no cost to the subcontractor"; to furnish a crane as required at no cost to the subcontractor except that the subcontractor would pay the crew. The subcontractor was required to furnish the necessary tie-wire and all other accessories. The contract provided that the subcontractor be paid in full by the contractor ninety (90) days after completion and acceptance of subcontractor's work by the owner.

Of the amount in Schedule I of the claim the State's auditors found $103,877.08 "not subject to audit determination" and $5,169.80 "not includible in claim". The reasons for their findings are stated in the Auditor's Report (Exhibit T, Schedule 1-I).

Bar Steel Construction Corporation failed to offer in evidence its estimator's bid work-up (Transcript, Vol. XXI, Page 35). Its schedule of additional cost was prepared for this claim (Transcript, Vol. XXI, Page 36) but it submitted no claim to Johnson, Drake & Piper. The President of Bar Steel Construction Corporation, Cedric Janien, was asked whether he had billed the amount shown on that schedule to Johnson, Drake & Piper and he replied: "No we didn't". (Transcript, Vol. XXI, Page 37).

The subsurface conditions at the site were not different from the conditions described in the Special Foundation

Notes of the Contract Proposal to which the Court has already referred. The design decision to support all footings on piles was based on such subsurface conditions. The State is not liable to the contractor-claimant under Schedule I, nor to the subcontractor. The subcontractor, if it has incurred any losses under the contract of November 7, 1961, would have to seek recourse against the Contractor.

The Second Cause of Action, Schedule J seeks to recover additional costs ($1,486,783.62) incurred in:

". . . the failure on the part of the State to approve timely the cast-in-place pile subcontractor, the failure on the part of the State to coordinate the work properly, the failure on the part of the State to provide access to the site of the work to Johnson, the failure of the State to fulfill other obligations on its part to be fulfilled, and because of the performance of extra work, Johnson became entitled to appropriate extensions of time in the completion of the Contract" (Paragraph 14, Notice of Claim).

The Demand for a Verified Bill of Particulars required the claimant to set forth the facts underlying these conclusory allegations.

The Contract was entered into October 31, 1961. The first pile rig arrived on jobsite January 30, 1962 and the first pile was driven February 13, 1962 by Raymond International, Inc., pending the approval of their pipe-step taper pile (ED-410) and other piles and equipment. Raymond expected that the piles and hammers which it intended to use on this jobsite would likely meet with the State's approval inasmuch as similar instruments had been aproved by the State on January 5, 1962 for Contract FAVWE 61-4.

The allegation that the State failed to coordinate the work properly and to provide for the claimant's access to the site attributes responsibility to the State for a situation completely controlled by and the responsibility of others, by the terms of the Contract Proposal. From February 1963 to the date of completion of claimant's work, the men, materials and equipment of numerous other contractors of the World's Fair Corporation converged on the jobsite. The contractors, including the claimant, failed to coordinate their activities thus obstructing, delaying and interfering with the claimant's work. The Claimant, in turn, obstructed, delayed and interfered with other contractors. Responsibility and liability are attributable to these contractors and no liability adheres to the State. (Contract Proposal, Pages 34-40, 110-122).

The Claimant alleges (Verified Bill of Particulars, 6C, Pages 47-49) that the State unreasonably delayed from December, 1961 to January, 1962 in submitting timber pile order lists to it after the timber test piles had been driven.

The approval of H. Johnson as subcontractor was given promptly on December 5, 1961 and two timber test piles were immediately driven. The remaining 13 timber test piles were driven between December 6, 1961 and December 29, 1961. The estimated quantity of 1,000 linear feet was overrun by 35 feet.

On December 14, 1961 the State approved the use of 50 foot lengths of timber piles for various structures (114, 119, 120 through 124A). On January 2, 1962 subcontractor Johnson began driving piles from M.H. 122A toward M.H. 120; and continued pile driving on January 3-5, 8-12, 16-19, 22, 1962. The contractor left the jobsite on January 23, 1962 because of a delay in the delivery of piles, but returned and resumed pile driving on February 2, 1962.

On January 23, 1962 the Claimant was given a list of 13 additional test piles which were driven between February

12, 1962 and February 28, 1962. On February 23, 1962 and again on February 28, 1962 TAMS gave the Claimant order lists for all piles except a group represented by test pile CB-146.

The Public Works Specifications (Pages 374, 375) provide for ordering of additional test piles and for the authority of the Deputy Chief Engineer to change the locations, numbers, lengths and methods of driving test piles at any time during the progress of the work. The subcontractor continued timber pile driving between February 2, 1962 and March 28, 1962, and, after unloading 85-foot piles on March 29-30, 1962, left the jobsite to return on April 29, 1962 to resume driving the 85-foot piles. The subcontractor again discontinued pile driving, between May 8-28, 1962 and again from June 8, 1962 to October 9, 1962.

The suspension of pile driving during the latter four-month period occurred despite the stockpile availability of 500 timber piles of 80 foot length and the availability on order of 300 more, as well as shorter piles which could have been obtained on notice. Because of insufficient sheeting from the drainage pier work, the claimant ordered a stoppage of pile driving on the drainage work to favor its pier work.

The Claimant's allegations (Verified Bill of Particulars, Page 48) that the State unreasonably delayed providing engineer lay-outs to the claimant, and that the State delayed unreasonably in checking the claimant's lay-outs after the latter began preparing them, are unsupported by proof. The Claimant, after destroying restaking piles, failed to comply with the requirements of the Contract Proposal (Page 25, Stake-out Survey) that the Contractor ". . . must provide his own men and instruments for actually reestablishing such marks if they had been destroyed due to his

operations or any other causes, subject to the check and correction of the Engineer".

To expedite the work TAMS provided the lay-out, the Claimant having failed to comply with the Contract Proposal. On January 15, 1962 the claimant wrote to TAMS requesting a stake-out of various piers. On February 2, 1962, the State informed the Claimant that it was transferring the responsibility for the stake-out from TAMS to the Claimant in accordance with the obligation imposed on the claimant by the Contract Proposal.

The Claimant's allegation (Verified Bill of Particulars, Page 48) that "Throughout the job the State was unreasonably slow in responding to requests by JDP and in supplying necessary clarification, approvals, information, etc." is general to the edge of vagueness and without any visible support in the record.

The Claimant's further allegation (Verified Bill of Particulars, Page 48) that "Throughout the job, State arbitrarily and unreasonably required JDP to overdrive its pile to a bearing capacity beyond that specified in the Contract" (6) should be considered in the light of Public Works Specifications.

> "When required, the lengths and number of the piles will be determined by actual loading of the tests, which will be paid for under the Item Load Tests for Piles. "All piles shall be driven to the elevation shown on the plans or to the resistance ordered by the Deputy Chief Engineer (Bridges) at the time of Driving". (Page 378, sub-paragraph h).

Pile-driving began on February 13, 1962 with a pipe-step tapered pile to a depth of 106 feet in Pier HC-1. The subcontractor continued driving piles at HC-1 on February 14, and 15, 1962. On February 16, 1962, it drove four piles in

Pier HC-2. These piles were driven an average of 140 feet without obtaining the required blow count, a figure in excess of the State's estimate of 75 feet. Piles were driven at Piers HC-3, HD-5, HD-6, before April 2, 1962 when the Claimant complained of delay in receiving permission to concrete piles and footings. The pouring of piles at these piers took place between March 28 and May 2, 1962 and the concreting of the footings on May 8 and 9, 1962.

The so-called Engineering News Record Formula of measuring driving resistance by blows per foot and of determining the allowable load capacity was regarded as unreliable by TAMS. Although the Public Works Specifications (Item 88P) makes provision for load tests for piles, the manner of loading a test pile must be as shown or indicated on the plans or as ordered by the Engineer. Neither the Contract Proposal nor any order of the District Engineer dealt with the subject.

As late as July 25, 1962, the District Engineer, in a letter to TAMS, stated the standard for the installation of cast-in-place concrete piles.

> "The required driving resistance shall be 150% of that computed from the Engineering News Record formula utilizing the 35 ton pile bearing requirement, and the driving energy of the Raymond single acting, heavy ram 1S hammer which was approved for this work. The open end piles under Item 85CO shall be driven to that penetration that will develop the required resistance. The minimum penetration for these piles however, shall be 10 feet below the invert of the existing 12'-6'x8'-0' Storm Sewer".

On August 14, 1962 according to the Resident Engineer, a 221 foot pile was driven in the HA-Abutment. On August 15, 1962 TAMS studied the feasibility of "freezing" piles at

no more than 110-115 feet depths, and an experiment the same day (in allowing the piles to remain undisturbed overnight) proved successful. On September 7, 1962 the District Engineer approved the "freezing" method. Pile driving was completed March 20, 1963 and pile connecting by March 27, 1963.

The State estimated 291,000 linear feet of cast-in-place piles. (Contract Proposal, Page 3, Item 95C). The Claimant was paid for 257,295.2 linear feet (Transcript, Vol. V, Page 153; Final Estimate, Sheet 2).

The Claimant alleges that "the State arbitrarily and unreasonably refused to permit JDP to concrete any piles until all pile-driving within 100 feet had been completed" (Verified Bill of Particulars, Page 44).

The Claimant's Project Engineer said he would have the Subcontractor correct this irregularity and others which delayed the Claimant. Permission to concrete certain piles were denied the contractor because the vibrations might have proved damaging to surrounding construction. Delays in concrete were not due to any pile driving restriction by T.A.M.S but resulted primarily from a lack of coordination between the Claimant and the Sub. inspector. There were instances where piles, after having been driven, waited one and two weeks before the Subcontractor's concreting crew got around to pouring the concrete. The Resident Engineer, on July 11, 1962, complained to the Claimant's Project Engineer of:

> ". . . a long time lapse of between one week and 10 days before Raymond concretes the piles after they are driven, and therefore, some piles are not checked until just before they are concreted. Therefore, some piles are unacceptable since they have completely expanded in this time".

The Subcontractor had no less than five other jobs in the same area at this time. (Transcript, Vol. XIII, Pages 8, 9).

The Claimant alleges (Second Cause of Action Par. 14) the performance of extra work. It alleges further that its performance of work called for by the Contractor was delayed, interfered with and made more difficult; that the amount of work which it had to perform was increased thereby entitling it to corresponding time extensions. (Verified Bill of Particulars, Page 49, subparagraph 6 (d)).

The "extra work" consists of a listing of 43 instances (Verified Bill of Particulars, Page 49 through 52, Exhibits G, L & M of the Verified Bill of Particulars). This allegation comprehends every aspect of the claim for work which was required by the contractor done to correct improper work done or done with little or no delay or done without additional time, or which was not the subject of any record or directive. Twelve additional instances of items of changed or extra work which allegedly hindered, delayed, interfered with or increased the work done are fully explained and negative any suggestion of the State's liability (Exhibit Y, Pages II-48 to II-64).

Paragraph 15 of the Second Cause of Action alleges that, despite the Claimant's entitlement to time extensions, which were refused or not granted, the State directed the Claimant to accelerate its performance to meet the original completion date or the subsequently extended completion dates and that such extensions were inadequate and not properly granted.

The Verified Bill of Particulars (Pages 54 through 57) repeats the allegation in general terms that: "JDP was delayed, interfered with and hindered in the performance of its work and was required to do extra and additional

work". It refers to Paragraphs 3 to 6 and 12 for a full description of the actions and alleges that it protested, but that the State failed and refused to grant an extension of the completion date. Instead it allegedly ordered the claimant to accelerate its performance to complete the work by the specified contract date.

Informal written requests for time extensions and reimbursements appeared in letters, dealing with other subjects, from the Claimant to TAMS dated January 23, 1962. The first formal request, Notice of Application for Extension of Time, dated October 29, 1963, submitted by the Claimant to the District Engineer, sought an extension of time from the original contract completion date, October 31, 1963, to December 31, 1963. The Notice of Application for an Extension of Time was filed *two days* before the scheduled completion date, although Article 4, Page 23, of the Public Works Specifications provides:

> "Notice of Application for such extension shall be filed with the District Engineer of the district within which the highway under construction is located at least *15 days* prior to the date of completion fixed by the terms of the agreement". (Interlineation added).

The record abounds in evidence that the Claimant lagged behind the Progress Schedule throughout the contract term. The District Engineer noted on March 20, 1962 that the Claimant had accounted for earned money of 3% of the contract instead of 13% as required by the Schedule. On June 26, 1962 the Claimant was 3 months behind. It was so informed and was asked to increase the size of its working force to complete the contract on the date scheduled.

The District Engineer on November 8, 1962, informed the Claimant that it was lagging behind its latest Progress

Schedule. It was urged to ". . . initiate the necessary steps to increase your present rate of progress" to meet the contract completion date.

On December 31, 1962, the Resident Engineer informed the Claimant's office Engineer that the project was 41% complete and the Progress Schedule required 62% completion. On January 11, 1963 the Resident Engineer informed the Claimant that it was more than 2 months behind Schedule. On June 13, 1963 the Superintendent of Public Works sent a wire to the Claimant informing it that 77% of contract time had elapsed and the work called for in the approved Progress Schedule had been only 63% completed, i.e. 3 months behind time Claimant's January 29, 1963 Progress Schedule. The wire contained the following:

> "I hereby direct you to increase your working hours or take other measures as necessary immediately to put your job on schedule".

On August 8, 1963, the TAMS Project Engineer advised the Claimant to increase its rate of placement of deck concrete. At this date, the Claimant was 3 months behind its Progress Schedule.

Pursuant to the Contract Proposal (Page 36, Progress of Work) the Claimant bore responsibility for submitting a completed Schedule of operations and of re-submitting it, if necessary, for the approval of the Engineer. The Contract Proposal states:

> "The Contractor will be required to place sufficient equipment, labor efforts on the work within ten days after the award of the contract so that the work may be progressed in accordance with the approved schedule".

The State's efforts to secure the Claimant's compliance with the Schedule of Progress and to assure the timely completion of the Contract have been extensively characterized by the Claimant as acceleration. The Claimant's Proposed Findings of Fact (No. 430):

> "The acceleration directed by the State was without basis in its contract with claimant (Ex. 380)"

is notable for two reasons. First, Exhibit 380, no matter how viewed, offers no support for the Proposed Finding. Second, the Contract, which has a stated date of completion, is deemd to offer no basis for one of its parties, the State, to urge the other party, the Claimant, to abide by the Schedule and make very effort for a timely completion. The Claimant, in effect, seeks to have the State held liable for its efforts to have the Claimant live up to its contractual obligation. This Court will not assist the Claimant in the attempt.

The total amount sought by the Claimant for his Second Cause of Action is the additional cost allegedly incurred in accelerating the performance of the work is $1,486,783.62. Of the sixteen items comprising the total amount only Item 10 is one for which the Court finds the State liable. The Claimant incurred the additional cost of siliconing concrete deck work in the sum of $3,232.81, a sum which included the general Contractor's 5% markup on the subcontractor's cost and remained unpaid. The silicone was added at the State's instructions and was not included in the original contract (Exhibit 401; Transcript, Vol. XVII, Pages 26-28).

The Third Cause of Action alleges increased cost ($455,008.62) incurred by the Claimant:

> ". . . because of the failure of the State, its agents, servants and/or employees to coordinate and progress the work in the area of the site in which Johnson was to perform its Contract and the work embraced therein and because of directives by the State to perform certain extra work, Johnson was caused to perform its Contract and work embraced therein in a manner not contemplated and intended by the Contract at the time of bid." (Notice of Claim, Par. 20).

It alleges further that it was compelled, under protest and solely because of the State's failure:

> ". . . to perform its work for an extended period, i.e. from October 30, 1963 to July 16, 1964, thereby being required to incur additional and increased cost and expense for material, labor and services . . ." (Notice of Claim, Par. 21).

The Third Cause of Action is based entirely upon the conditions and allegations already set forth in the First and Second Causes of Action with both of which the Court has already dealt. The Claimant seeks to burden the State with the responsibility for delay in completing the contract from its scheduled date, October 30, 1963, to its extended date, July 16, 1964, and to recover the

> ". . . increased cost of performing the work after the said date which cost were over and above what the cost would have been had contractor been permitted to perform the work as contemplated and intended by the contract the time of bid".

In its Statement of Claim (Verified Bill of Particulars, Exhibit B, Pages 26, 27) the Claimant seeks $299,048.03 "for the extended period of overhead, general equipment rental and administrative costs" (Part A). It claims $97,973.17 ". . . incurred increased cost in pumping water after the date upon which it would have been completed, i.e.

January 14, 1963". (Part B). It claims $19,770.33 for the alleged cost in placement of reinforcing steel after August 1, 1963. (Part C). It claims $38,273.09 for the alleged increased cost incurred by its Subcontractor, Jandous Electrical Company, a sum consisting entirely of charges for supervisory personnel and equipment but containing no charges for electricians or other labor. (Part D).

The greater part of alleged damages in the Third Cause of Action (Part A) is attributed by the Claimant to the interferences at the jobsite of other contractors, particularly Tufano Construction Corporation. (Proposed Findings of Fact, Nos. 478 through 482). The Contract Proposal (Page 35) defines the responsibility of the Claimant and the obligation of the State in such situations, as follows:

> "In case of interference between the operations of different contractors, the Engineer will be the sole judge of the rights of each contractor and of the sequence of work necessary to expedite the completion of the entire project, and in all cases his decision shall be accepted as final. The Contractor agrees that he has included in his unit prices bid for the various items of the Contract the additional cost of doing the work under this Contract because of the fact that he does not have a clear site for the work and because of interference of roadway use, other contractors and necessary utility work and because of any other limitations herein specified."
>
> • • •
>
> "Delays in the availability of any part of the site or any delays due to interference between the several contractors, or by utility companies, shall be compensated for by the Superintendent of Public Works solely through granting an extension of time in which to complete the work of the Contract. The Contractor shall have no other claim against the State of New York for any damages due to such delays or interference, other than extended time in which to complete the work".

The Scheduled completion of pumping (Part B) by January 14, 1963 was rendered impossible by the Claimant's use of inadequate lengths and insufficient strength of sheeting which it employed. The responsibility for failure to perform the work properly rests with the Claimant and not with the State.

The Scheduled completion by August 1, 1963 of the work of subcontractor Bar Steel Construction Corporation was delayed to December, 1963 (Part C). The claim for the placement of reinforcing steel after August 1, 1963, an item that was bid and paid for, has no relevancy in point of time as charged by the Claimant. The cause of the delay was revealed by the President of the Bar Steel Construction Corporation, Cedric Janien, in cross-examination:

> "Q. But you couldn't do your work, could you sir, until the cofferdams were built where they were necessary and until the pile driving was done, is that correct?
>
> A. That's correct.
>
> • • •
>
> Q. If there was a cofferdam failure you could not get access to that area, could you?
>
> The Witness: No, we couldn't work efficiently. If there was a failure we had to hang around." (Transcript, Vol. XXI, Pages 31, 32).

If extra work was performed the subcontractor was required by Article 14 of its Agreement with the Claimant to bill the Claimant for it. It failed to bill the Claimant for extra work or for additional costs. The schedule for ad-

ditional costs, from August to December 1963, was prepared for claim purposes of the Claimant (ibid, Pages 26 through 37). The responsibility, if any, for additional costs incurred is a matter to be determined between the Claimant and its subcontractor.

The claim (Part D) for $38,277.09 for increased costs because of delays to subcontractor Jandous Electric Construction Corporation fails to indicate any reason for holding the State liable. Vice President Feinsilber of Jandous, under cross-examination, stated that his company had no bid work-up for the project (Transcript Vol. XVIII, Page 17); that the extra work beyond what was called for in the contract had been paid for (ibid, Page 22); and that he was not making any claim for idle equipment (ibid, Page 24).

The Fourth Cause of Action, consisting of miscellaneous claims, seeks to recover $89,230.84, the additional and increased cost and expense allegedly incurred, under protest, in having been ordered by the State to perform certain extra and/or additional work beyond that required by the Contract. The allegedly extra and/or additional work is set forth in the Statement of Claim (Verified Bill of Particulars, Exhibit B, Pages 30 through 39, Schedule O, Notice of Claims) in 16 paragraphs. The Court's findings in respect of each is stated:

1) The Claimant seeks $33,307.52 for the installation of permanent steel sheeting in the construction of the drainage run 20-21-22 at Rodman Street. The Claimant had the obligation of removing and salvaging the sheeting, under Item 83X, after having been advised that he would not be paid for permanent sheeting.

2) The Claimant seeks $6,689.62 for the excavation of earth materials from the Flushing River South of the haul

road in the vicinity of Pier HD-9. The restoration of the river to its original condition was an obligation of the Claimant under Item 82S of the Contract Proposal (Page 124), and of the Public Works Specifications (Page 43).

The Claimant seeks $2,619.74 for new coping allegedly required for the alteration of existing walls at Piers HB-2 and HC-16. The Superintendent of Public Works properly denied this claim in his letter to the Claimant dated July 23, 1964 on the ground that "the minor changes in the stone coping required for restoration are apparent from the plans and specifications".

4) The Claimant seeks $412.12 for the State's alleged failure to afford it a proper site in Park Service Road A in the vicinity of Piers HD-5 and HC-2 which necessitated the concreting of the pavement of the partially constructed roadway before covering it with asphaltic concrete paving. The need for concreting resulted from the operations of another contractor, Tufano Contracting Corporation. If the Claimant has sustained damages it should proceed against Tufano and not against the State.

5) In response to the claim for $910.30 for the taking of concrete cores in the footings of Piers HA-2 and ML-37 and 39 and in the pavement of North Collector Distributor Road, the District Engineer in his letter of April 28, 1969 correctly replied that . . . "the contractor violated contract specifications . . . was advised of such violations and requested to provide proof as to the strength acceptability . . . the cost of all such cores or other methods of proof that the Contractor selects shall be borne by the Contractor with no contribution whatsoever by the State of New York". The Claimant was paid $300 for the taking of test cores at ML-37N and 39S under new Item 925. It is not entitled to further payment.

6) The claim for $438.56 for extra work in connection with the fabrication of Item 202-8 galvanized W.I. pipe was correctly disallowed by the Superintendent of Public Works because the Claimant had:

> "Apparently failed to follow the revisions and corrections shown on the shop drawings and did not head the 'Approved as Noted' statement thereon. Note 'A' clearly stated that all dimensions and correction details 'shall be verified in the field before fabrication'.
>
> "It is also noted that additional costs incurred were undoubtedly the direct result of failure to clearly and accurately observe, define and fabricate the bridge drainage facility that could be installed at the location required by the contract plans."

7) A claim in the sum of $263 for inspecting and cleaning an existing 18" sanitary sewer line under the Flushing River was correctly disallowed by the Superintendent of Public Works in a letter to the Claimant dated July 13, 1964 because rectification of the damage that the contractor itself had caused cannot be considered extra work within the purview of the Public Works Specifications.

8) The claim for $5,455 deriving from an alleged order of the State requiring the contractor to place additional concrete was properly disallowed by the District Engineer in a letter to the contractor dated October 23, 1964. The structural steel stringers over which the concrete was placed had excessive camber and would ordinarily have been rejected. Due to the pressure of a World's Fair deadline the District Engineer accepted the stringers thereby necessitating a finished concrete slab thickness 8" less than required in the contract.

9) The claim in the sum of $1,365.58 for the alleged additional cost of opening the viaduct on December 30, 1963 was properly disallowed by the Superintendent of Public Works in his letter to the contractor dated June 30, 1964. The Contract Proposal (Page 118, Paragraph i) provides:

> "When directed by the District Engineer the contractor shall open to traffic any portions of new pavement or structures before final acceptance of a contract."

The same "shall be paid for at the lump sum price bid for this item".

10) The claim for $219.87 for the caulking under the mall barrier posts on the Main Line Viaduct was correctly disallowed as contract work covered by the Contract Proposal and the Public Works Specifications.

11) The Claimant seeks $2,201.42 for the construction of field inlet 102A and catch basin 102B ordered by the District Office. The Superintendent of Public Works in a letter to the Contractor, dated May 13, 1964 correctly disallowed the Claimant for the following reason:

> "We find the work ordered by the District Office was completely similar to other drainage work on the contract plans and within the intent, scope and requirement of the contract which provides proper and adequate drainage facilities within the project site. The additional drainage work is not found excessive in quantity and was ordered when your forces were working on the site. The order was reasonable and necessary and in accordance with the spirit and intent of the Contract and its specifications."

12) The Claimant seeks $1,468.48 for having repaired leaks in the 20" force main. The Superintendent of Public

Works in a letter to the Claimant July 10, 1964 correctly disallowed the claim because the leaks which developed were the direct result of the Claimant's construction operations, such as pile driving and other heavy construction activities, performed directly above and adjacent to the sanitary line. The responsibility and cost for repairing this damaged line was the contractor's.

13) The Claimant seeks $859.71 for corrective work on sign support bases L-3, and L-12. The Superintendent of Public Works properly disallowed any liability of the State for this work in a letter to the Claimant dated August 27, 1964 which read, in part, as follows:

> "We have reviewed your letter and the appropriate contract documents and find that a construction error produced in the expansion joint of the VanWyck Expressway viaduct at sign base supports L-3 and L-12 was so produced by you and is a clear violation and contradiction of the subject contract plan requirements.
>
> "All remedial work is to be performed by you at no cost to the State."

14) This claim is in the sum of $9,894.72 for the purchase of additional reinforcements alleged to have been required by the "redesign of the concrete structure on the HE Ramp east and west side . . ." (Paragraph 23, Notice of Claim). The Demand for a Verified Bill of Particulars (Paragraph 12, Pages 6, 7) required the Claimant to set forth in detail the facts underlying this part of the claim. The Verified Bill of Particulars (Paragraph 12 (o), Page 84) stated that:

> "Contracts Drawings 204, 205, 206 and 207, which relate to the HE Ramp, were revised by the State

> primarily to provide for a continuous pile cap support. This revision, among other things, required that the concrete forms had to remain in place, that reinforcing steel which had already been fabricated and delivered had to be revised, and that backfilling and overall construction methods were complicated and made more expensive and time consuming."

The record bears out this portion of the claim. The claimant, in its Proposed Findings of Fact (Nos. 554 through 557) reduced the claim to $8,311.26, to reflect the audit figure after deducting the disallowed sums.

15) A claim in the sum of $21,560.26 for the increased cost of timber pile cut-offs (Paragraph 23, Notice of Claim) is described in detail in the Verified Bill of Particulars (Paragraph 12 (p), Page 84), which states that:

> "JDP incurred increased costs in cutting, removing and disposing of these increased lengths."

The claim was properly disallowed because of a provision of Public Works Specifications:

> "m. Measurement and Payment. . . . The unit price bid per linear foot shall include the cost of furnishing all labor, materials and equipment necessary to complete the work . . .
>
> "Piles that are delivered at the site of the work in accordance with the itemized list furnished the Contractor by the Engineer, and that for any reason are not used in the work shall be the Contractor's property if he so elects. In event that the Contractor does not desire to retain these piles for his own use, the Department will purchase the same at the cost of the piles delivered at the site of the work." (Page 379).

16) A claim in the sum of $1,564.10 appears in the Notice of Claim (Paragraph 23, Schedule O). The Verified Bill of Particulars (12 (q), Page 54) states:

> "Item was inserted as an item of extra work (Item 902) to perform cementing of the concrete pavement on the existing pavement of Long Island Expressway."

The Claimant states that it incurred costs of $16,038.89, has received payment in the sum of $14,474.79, and seeks to recover the difference. This items account Work Item 902 was substantially completed on February 15, 1967 and finally completed on January 7, 1968. The Claimant failed to submit properly receipted bills and the discrepancies that appeared on those that were submitted warranted the reduction of this claim to $1,105.00, the amount confirmed by the Auditor's Report.

The Fifth Cause of Action alleges that:

> "The purported Final Agreement and Final Estimate . . . hereof was made falsely, erroneously, arbitrarily, wrongfully, in bad faith, in violation of the terms and provisions of the Contract and misconstruction thereof in that, among other things, it certified for payment the quantities or amounts set forth under the column below designated 'Quantity or Amount Improperly Certified' instead of certifying the true and correct quantities properly computed . . ." (Notice of Claim, Paragraph 26).

The Demand for a Verified Bill of Particulars sought to have the Claimant:

> ". . . set forth the facts underlying the conclusory allegation that the purported Final Agreement and Final Estimate was made falsely, erroneously, arbitrarily, wrongfully, in bad faith, in violation of the terms and provisions of the contract and in misconstruction thereof, including, but not limited to, setting forth in haec verba the terms and the provisions of the contract which were violated and the terms and provisions of the contract which were misconstrued . . ." (Demand 14a)

The Verified Bill of Particulars fails entirely to respond to the Demands of Paragraph 14.

The Fifth Cause of Action sets forth eight separate claims for which the Claimant seeks additional compensation of $79,101.43. In its Proposed Findings of Facts (No. 570) the Claimant has reduced its total claim to $78,801.43. The State's Auditor's Report (Exhibit T, Page 162) states that:

> "No data was submitted by claimant, therefore, auditors have placed the amount of claim as unaudited."

The Court's findings in respect of the eight claims follow:

1) The Claimant's allegation that it is entitled to payment in the sum of $14,668.00 for specified quantities of Items 25S and 25SU is without merit. The State properly denied such payment because the Contract Proposal (Pages 92, 93) provides for payment for square yards of pavement and not for square yards of steel fabricated reinforcements.

2) The claim for $4,000 under Items 47 and 47C involving a substitution pursuant to Contract Amendment No. 2, is correctly made and is approved.

3) The claim for $3,126 for additional top soil under Items 121 and 121A is disallowed. The Public Works

Specifications (Pages 439, 440) provide for payment of the number of cubic yards of top soil measured after it had been acceptably placed and such payment includes full compensation for all labor, materials, equipment and incidentals necessary to complete the work as specified. The Claimant's failure to stock pile and place the top soil properly and its partial loss before final placement are the Claimant's responsibility.

4) The claim for $9,003.06 to cover a quantity of Item 207S which, allegedly, had not been certified, was properly disallowed. The additional amount is for 15,005.10 lbs., of steel water main specials at $.60 per lb. An examination of the Contract Proposal (Page 146) under Item 207S discloses that the straight pieces of pipe, for which additional payment was sought, were specifically excluded from this Item.

5) The claim for additional payment under Item 76YS in the sum of $3,505.02 was properly rejected by the State because of nonperformance of the alleged watchmen service (Final Estimate, Page 10).

6) The claim for additional payment of $300, for an altered two-catch basin, field inlets, manholes and top inlets at the HF Ramp, was properly disallowed. No evidence was adduced of the locations at which the work was alleged to have been done. The Final Estimate included payment for all alterations at the HF Ramp.

7) The claim in the sum of $42,118.43 for additional payment under Item 84TC which, allegedly had not been properly certified, was correctly disallowed. The claim is based upon the incorrect assumption that 30′ was the estimated length of creosoted timber piles. The total quantity consisted of 2,694 creosoted timber piles having a total of

141,431 linear feet or an average estimated length of 54.45 linear feet, and was paid for in accordance with the Public Works Specifications (Page 379). Piles in excess of 66 feet were paid for additionally.

8) A claim in the sum of $2,380.92 is made in behalf of Claimant's Subcontractor W. B. Johnson, Jr., for additional payment under Item 28B for a quantity of sheer connectors. The claim was properly disallowed because the Claimant failed to reply to a Demand (Par. 15, Demand for a Verified Bill of Particulars) for a location by stations where the work was performed or the material incorporated. The Claimant adduced no evidence in support of its claim.

The Sixth Cause of Action alleges an additional amount of $2,643.06 due under Item 601, Watchmen Service. The State sought to have the Claimant:

> ". . . furnish a schedule of the dates and hours Uniformed Watchmen Service worked but for which the Claimant was not paid." (Demand, Verified Bill of Particulars, Par. 16).

The Verified Bill of Particulars did not respond to the Demand. It was marked "unaudited" by the State's auditors because "Claimant did not submit supporting data". No evidence was adduced in support of this Cause of Action.

The Contract was accepted as performed on August 13, 1964. The Final Estimate was not received until August 30, 1967. The time gap is unexplained. Lawful interest is to be computed from November 13, 1964.

The trial transcript in the above-entitled suit consists of 23 volumes and more than 4,000 pages. The Exhibits, numbering 626, cover more than 5,000 pages. The Verified Bill of Particulars, motions papers, briefs and memorandums consist of more than 1,100 pages.

CPLR 4213 (a) states:

> "Before the case is finally submitted the Court shall afford the parties an opportunity to submit requests for Findings of Facts. Each request shall be numbered and so phrased that the Court may conveniently pass upon it."

The Claimant has submitted for the Court's consideration a single page containing 5 suggested Conclusions of Law and 70 single spaced pages containing 575 Proposed Findings of Facts and approximately 2,000 references to the transcript and the Exhibits.

The Court has sought to render its written decision within 60 days after final submission, as provided in CPLR 4213 (b) and (c), but has been thwarted by the sheer mass of Exhibits and Proposed Findings of Facts. The attempt would be time-consuming and complicated by the repetition of evidentiary material, comment, argumentation and other improprieties of style and substance not within the purview of CPLR 4213. Few of the 575 Proposed Findings of Facts could be called ultimate or essential facts.

The State submitted 98 Proposed Findings of Facts. Proposed Finding of Fact No. 1 states: "The following Proposal provisions (Exhibit 1 in Evidence) are applicable to pile driving". Three and one-half pages of actual text from Exhibit 1 follow. The second Finding of Fact states: "The following provisions of the Public Works Specifications of January 2, 1957 (Exhibit 3 in Evidence) are also applicable to pile driving". Six and one-half pages of actual text from Exhibit 3 follow. The Proposed Finding on cofferdams states that the provisions of Exhibits 1 and 3 on the subject are applicable and two and one-half pages of actual text from both Exhibits follow.

Under the heading General and Mixed Findings five and one-half pages of further actual text from Exhibit 1 follow. In summary, 18 pages of a total of 28 pages of the State's Proposed Findings of Facts are verbatim extracts from the contract documents that are in evidence. If the State felt that certain provisions of these two Exhibits had particular legal significance it could have called such provisions to the attention of the Court in its Memorandum of Law.

Counsel for both parties have ignored a long line of decisions defining the nature and purpose of Proposed Findings of Facts and the specific instructions of this Court that such Findings contain ultimate or essential facts and no evidentiary material. Their lapses into compliance and intelligible utterance of ultimate facts are so infrequent as to defy the Court's prolonged effort to search them out. With occasional exceptions, the 673 Proposed Findings of both parties are argumentative, discursive and evidentiary. Accordingly, the Court has not marked the Proposed Findings of either party.

The Court finds that the Claimant has failed to sustain the burden of proof in respect of the State's liability in all six Causes of Action with the exception of:

The Second Cause of Action, Schedule J, Item 10, for which the Court awards $3,232.81;

The Fourth Cause of Action, Schedule O, Item 14, for which the Court awards $8,311.26;

The Fourth Cause of Action, Schedule O, Item 16, for which the Court awards $1,108;

The Fifth Cause of Action, Items 47 and 47C, for which the Court awards $4,000.

The Court awards the Claimant $16,652.07, the total of the awards in the Second, Fourth and Fifth Causes of Action, with lawful interest from November 13, 1964 to the date of entry of judgment herein.

Appendix C, Decision of Court of Claims, State of New York.

In the Seventh Cause of Action, severed by Order filed December 20, 1967, for which judgment was awarded in the sum of $294,401.39 and the further award to the Claimant of a return of Bonds of a par value of $66,000, the Court awards lawful interest on the amount of $294,401.39 from November 13, 1964 to December 29, 1967, date of entry of the severance judgment, in the amount of $36,832.89, with interest on said sum from December 29, 1967 to the date of entry of judgment herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

ADOLPH C. ORLANDO
Judge of the Court of Claims

Dated: Aug. 26th 1974
New York, New York

Appendix D, Partial Comparison of Claim Report With Decision of Court of Claims.

For ease of comparison the text will be printed on the following pages.

State's Exhibit Y (Claim Report)
First Cause of Action

pp. I-1, 2 As to Sched. A: "The Claimant's use of wood sheeting at these four sites was done without regard to the conditions indicated in the Contract Documents, inadequate pre-bid investigation of the site . . ."

p. I-3 Sched. B: "Excessive heave within sheeted excavations can be prevented by the installation of the sheeting to a sufficient depth below the bottom of the excavation."

p. I-4 Claimant "elected to over-excavate to remove anticipated excessive heave, rather than provide adequate sheeting as required under the terms of the Contract Documents."

p. I-6 Sched. C: "In spite of the subsurface conditions indicating an indefinite length of piles to be driven, the Contractor selected to use a type of pile which, he alleges, is more costly to him when the driven length exceeds 80 feet."

p. I-15 "The delays sustained by the Subcontractor and Contractor were a matter of their own internal arrangements. They did not coordinate their activities . . . . The primary reason the work was "disjointed", however, was the excessive number of cofferdam failures attributable solely to the Claimant."

p. I-41 Sched. D [quote from Proposal, p. 29] "Bidders were further forewarned of the poor subsurface conditions in that the use of surcharge as a means of stabilizing and consolidating compressible materials would be required at certain locations."

pp. I-45, 46 "There is no basis for the Claimant's allegation that the Contract Documents implied that short cofferdam sheeting would be sufficient, since no sheeting of any kind was indicated on the Contract Plans for the construction of cofferdams." [Quote from standard specification Item 82, p. 369 and from Contract Proposal, p. 124] "The methods of construction adopted by the Contractor were the Claimant's sole responsibility. His selection of

Decision
First Cause of Action

A3319 As to Sched. A: "The Claimant's use of wood sheeting showed disregard of the conditions indicated in the Contract Documents and either inadequate or no prebid investigation of the site."

A3319 Sched. B: "The Claimant's pier excavation to reduce excessive heave . . . should have been within sheeted excavation to a sufficient depth below the bottom of the excavation."

A3319 "Claimant chose to over-excavate to remove excessive heave rather than to provide adequate sheeting as indicated by the terms of the contract."

A3320 Sched. C: "The subsurface conditions indicated an indefinite length of piles to be driven. The Claimant, nevertheless, chose for use a pile which is more costly according to its allegation, when driven to a length in excess of 80 feet."

A3321 Delays to subcontractor Raymond, "occurred primarily because of a lack of coordination between the Claimant and its subcontractor and also because the improperly designed cofferdams failed when pile driving equipment was placed on their perimeter."

A3321-2 Sched. D: Claimant was adequately forewarned by the Contract Proposal, p. 29, and "further forewarned that certain specified locations would require the use of surcharge to stabilize and consolidate compressible material. . . ."

A3322-3 "Nothing in the record would justify the Claimant's allegation that the contract implied which cofferdam sheeting was indicated in the contract drawings." [Quotes from standard specifications, Item 82, p. 369 and from Contract Proposal, p. 124]. The claimant bore sole responsibility for the selection of the wood sheeting and the AP3 steel sheeting which resulted in the cofferdam failures. . . ."

State's Exhibit Y (Claim Report)

the inadequate timber [illegible]/or AP3 steel sheeting resulted in failures of several cofferdams."

p. I-47 [A] letter dated September 20, 1962 from TAMS to the District Engineer's office contain[ed] TAMS comments on the Contractor's revised Progress Schedule and "pointed out the lack of progress in pile driving operations resulting from numerous cofferdam failures."

p. I-50 "The Contract was signed with an effective date of October 31, 1961 and work to be completed within 24 months. The approved Progress Schedule dated November 28, 1961 showed piles to be driven commencing in December 1961 and completed by December 1962. Although cofferdams, as a separate item of work, were not shown in the Progress Schedule, the cofferdams would have to be constructed within or prior to the time period that piles were to be driven. However, Claimant did not commence work on the cofferdams until June 4, 1962, amounting to a time loss of 7 months, or approximately 25 percent of the total available contract time."

pp. I-52, 53 "In summary, it is our opinion that the Claimant's failure to execute this Item of Work at the Contract bid price was due solely to his failure to recognize and meet the problems involved in the construction of cofferdams. In addition, the Contractor did not commence work on the cofferdams until 7 months after the signing of the Contract, which precluded completing the work on time. As a result of the cofferdam failures enumerated hereinabove, two pile driving rigs were removed from the jobsite, and the rate of pile installation was greatly reduced. There was also an overall delay in pile driving, footing, column, and column cap concrete work, and steelwork construction so that these costs also increased. Since the Claimant realized that he was falling further behind his progress schedule, he elected to purchase additional sheeting and bracing, hire additional crews and provide additional work sites for the pile subcontractor in order to accelerate the work in an attempt to effect completion of the work by the Contract completion date. The costs for extraction and replacement of damaged sheeting, addi-

Decision

A3323 "The cofferdams failures were, in turn responsible for the retardation in the Progress Schedule of the pile-driving operations as pointed out in a letter from TAMS to the District Engineer's Office dated September 20, 1962."

A3324 "The effective date of the Contract was October 31, 1961 and the date of completion was within 24 months of that date. The Progress Schedule, dated November 28, 1961, required piles to be driven beginning December 1961 and to be completed by December 1962. There was no specific indication in the Progress Schedule of a completion date for cofferdams, but, as a practical matter, they had to be constructed sometime before the piles could be driven. Work began on the cofferdams on June 4, 1962, a loss of approximately 7 months of the 24 months allowed for the completion of the entire contract."

A3326 "The Claimant defaulted in its plainly defined responsibilities under the Contract Proposal and Public Works Specifications in respect of the cofferdams. It failed to start work on the cofferdams until approximately 7 months had elapsed from the date of the signing of the Contract. The cofferdam failures were responsible for the removal from the job-site of two pile driving rigs. The consequences of overall delay in pile driving, footing, column and column cap concrete work and steel work construction were an increase in overall cost. The Claimant having fallen far behind in his Progress schedule, incurred the increased expense of additional sheeting and bracing, hiring additional personnel and providing additional sites for the pile subcontractor, in attempting to meet the contract completion deadline. The additional cost for the removal and replacement of damaged sheeting for new sheeting and for the excavation of heave resulted from the Claimant's erroneous choice of wood sheeting and AP-3 steel sheeting. Had the Claimant used the Z-type sheeting of correct size from the inception of the cofferdam construction, had they done so timely instead of delaying 7

tional sheeting, and excavation of heave can only be attributable to the Contractor's choice of inadequate wood and AP-3 steel sheeting in the initial stages of the work. Had the Z type sheeting of proper lengths been employed from the beginning of the job, the additional costs claimed by the Contractor would not have been incurred. This claim is hereby rejected."

p. 52 "One year after the Contract was executed in October 1961, the problem of the cofferdam construction was finally resolved. Unfortunately, it was too late to economically perform the remaining work of this Item within the remaining Contract time, since the urgency of the work did not permit the multiple use of sheeting as is normally practiced."

pp. 56, 57 "The rapid placement of heavy embankments using heavy tractors to move the material is not "standard construction practice" for this type of work. Rather, the Claimant should have used proven construction practices where organic silt is involved. These practices should have included the use of lighter construction equipment and the placement of thin blankets of fill. . . . The original strength can be regained if the material is allowed to remain undisturbed for a period of approximately 24 hours."

p. 57 ". . . cofferdam construction commenced in June 1962 at which time the Claimant placed temporary fill in the Flushing River. The fill was placed to facilitate cofferdam construction."

p. I-58 "In essence, the Claimant's own construction procedures were responsible for the mud waves, so therefore he was obligated to remove them, inasmuch as they blocked the flow of the Flushing River. All costs for removal of the mud waves should have been anticipated by the Claimant and included in Contract bid Item 82S, Cofferdams."

pp. I-63, 64 Sched. F: [Quotes p. 30 of Proposal and pp. 207 and 369 of standard specifications.]

"Had interlocking Z-type steel sheeting been used and properly placed to sufficient depths to penetrate the under-

months, the chain of costly misadventure would not have been forged."

A3327 "The temporary Z-type sheeting might have been economically reused by the Claimant had the Claimant made the choice in the first place. Their late use when the Claimant was lagging badly precluded such reuse."

A3329 Sched. E: "The Contract Proposal and Public Works Specifications were sufficiently explicit for a Contractor of size, standing and longtime expertise to have been forewarned that the rapid placement of heavy embankments, and the use of heavy tractors to move the material, on a deep substratum of organic silt, would probably cause mud waves. The contractor could have chosen lighter construction equipment and a thin blanket of fill and allowed a full day for the organic silt to regain its strength."

A3329 "The Claimant began to place temporary fill in the Flushing River in June 1962 as a means of facilitating the construction of cofferdams."

A3329-30 "The temporary alteration of the bounds of the Flushing River was a measure of convenience for such construction and the mud waves were a concomitant of the Claimant's ill-chosen construction methods."

A3331-2 Sched. F: [Quotes p. 30 of Proposal, and pp. 207 and 369 of standard specifications.]

"The Claimant's failure, in respect of cofferdams, was responsible in a good measure for the increased cost in-

laying organic silt and effectively seal the excavations, the risks of pumping would have been considerably reduced."

p. 1.62 "The World's Fair Corporation contended that it was JDD's failure to place pipes under the dikes and the resulting mud waves which restricted the flow of water downstream causing the water to back up. The World's Fair Corporation did, however, concede that the tidal gates were not functioning properly and would be repaired within the following two or three months."

Sched. G: pp. 1.74-82 [Quotes from pp. 30-31 and refers to p. 123 of Contract Proposal, quotes p. 138, refers to p. 135; refers to contract drawings 53, 60 and 199.]

p. 1.105 "As previously stated herein the subsurface conditions encountered at the site were not different from those conditions described under the Special Foundations Notes on page 29 of the Contract Proposal . . ."

"The basis for the design decision to support all footings on piles was the presence of unsuitable subsurface conditions incapable of supporting spread footings."

p. 1.106 "Accordingly, the subcontractor's claim is invalid. If, in fact, the subcontractor incurred losses during the course of the work, his claim should be directed against the General Contractor."

Second Cause of Action

p. 11.3 "We are of the opinion that this portion of the claim has no validity. . . . In fact, though the pipe-step taper pile (ED-410) had not yet been formally approved, Raymond commenced driving such piles on February 13, 1962 at Bays 11C-Pier 1. We conclude therefore, that Raymond had no doubts regarding the pending approval of their equipment and piles, considering that these types of piles and hammers had been approved by the State on January 5, 1962 for Contract FAVWE61-4."

curred in dewatering, a failure which might have been avoided by the use of Z-type steel sheeting of sufficient depth."

A3333 "The flooding of the project site occurred because the Claimant failed to install drainage pipes under the earth dikes."

A3334-6 Sched. G: [Quotes from pp. 30-31 and refers to p. 123 of Contract Proposal, quotes p. 138, refers to p. 135; refers to contract drawings 53, 60 and 199.]

A3339-40 Sched. I: "The subsurface conditions at the site were not different from the conditions described in the Special Foundation Notes of the Contract Proposal to which the Court has already referred.

The design decision to support all footings on piles was based on such subsurface conditions.

The State is not liable to the contractor-claimant under Schedule I, nor to the subcontractor. The subcontractor, if it has incurred any losses under the contract of November 7, 1961, would have to seek recourse against the Contractor."

Second Cause of Action

A3340 Sched. J: "The Contract was entered into October 31, 1961. The first pile rig arrived on jobsite January 30, 1962 and the first pile was driven February 13, 1962 by Raymond International, Inc., pending the approval of their pipe-step taper pile (ED-410) and other piles and equipment. Raymond expected that the piles and hammers which it intended to use on this jobsite would likely meet with the State's approval inasmuch as similar instruments had been approved by the State on January 5, 1962 for Contract FAVWE 61-4."

State's Exhibit Y (Claim Report)

p. II-4 ". . . the Claimant alleges that there was a general, continuing and pervasive failure by the State to properly cordinate the work and to provide JDP with reasonably free and unobstructed access to the site of the work.

Beginning in February, 1963 and continuing until JDP's work was completed, equipment, materials and labor forces of contractors for the World's Fair were present on the jobsite. These contractors parked equipment and stored materials all over the site, did extensive work on the site, and were continually moving men and equipment back and forth over the site. . . . The work of these contractors was not coordinated with that of JDP and their presence on the site damaged, obstructed, delayed and interfered with JDP's work."

pp. II-9, II-17 "We agree that interference did in fact take place; however, there is no basis for a claim against the State of New York, which was not the offending party."

. . .

"The provisions of Coordination of Work-Availability of Site, pages 34 and 35 of the Contract Proposal, clearly indicated to the Claimant that delays, interruptions, and hindrances were to be anticipated. . . ."

p. II-23 "(1) Claimant alleges that the State unreasonably delayed in submitting timber pile order lists to JDP after the timber test piles had been driven. The inclusive dates of this failure are December 1961-January 1962. . . ."

"The Engineer's diary records that on December 5, 1961: 1) Subcontractor H. Johnson arrived on the job; 2) the District Engineer approved, by telephone, H. Johnson as Subcontractor; 3) the driving of two timber test piles in structures 120 and 123 by the Subcontractor Johnson.

"The Engineer's diary records that the remaining 13 timber test piles were driven between December 6 and 29, 1961. The estimated quantity of 1,000 L.F. was overrun by *35* feet" (sic).

Decision

A3341-2 "The allegation that the State failed to coordinate the work properly and to provide for the claimant's access to the site attributes responsibility to the State for a situation completely controlled by and the responsibility of others, by the terms of the Contract Proposal.

From February 1963 to the date of completion of claimant's work, the men, materials and equipment of numerous other contractors of the World's Fair Corporation converged on the jobsite.

The contractors, including the claimant, failed to coordinate their activities thus obstructing, delaying and interfering with the claimant's work."

A334[illegible] "The Claimant, in turn, obstructed, delayed and interfered with other contractors. Responsibility and liability are attributable to these contractors and no liability adheres to the State. (Contract Proposal, Pages 34-40, 110-122)."

A3341 "The Claimant alleges (Verified Bill of Particulars, 6C, Pages 47-49) that the State unreasonably delayed from December, 1961 to January, 1962 in submitting timber pile order lists to it after the timber test piles had been driven.

The approval of H. Johnson as subcontractor was given promptly on December 5, 1961 and two timber test piles were immediately driven. The remaining 13 timber test piles were driven between December 6, 1961 and December 29, 1961. The estimated quantity of 1,000 linear feet was overrun by *35* feet" (sic).

State's Exhibit Y (Claim Report)

p. II-27 "TAMS, in order to expedite the work, performed detailed layout including off-setting drainage structures and ditches, re-setting centerline after excavation and other detail layouts, which were, in fact, the responsibility of the Contractor."

"By letter dated January 15, 1962 to TAMS, Claimant requested stake-out of various piers, including a request to "*restake* the centerline of Ramp Piers HD-1, HD-2 and HD-3", work not required to be performed by TAMS. Subsequently, by letter dated February 2, 1962, the State transferred the responsibility of "Stakeout Survey" from TAMS to the Claimant."

p. II-34 "(5) Claimant alleges that throughout the job the Stake was unreasonably slow in responding to requests by JDP and in supplying necessary clarifications, approvals, information, etc.

Our comments are:

The Claimant's statement is too vague to permit us to reply to his charges until they are spelled out in detail."

p. II-38 [Quote from Specifications, p. 378, h.] "Pile driving commenced on this project on February 13, 1962, at which time a pipe-step tapered pile was driven to a depth of 106 feet in Pier HC-1 without obtaining the required blow count. Raymond continued driving piles in HC-1 on February 14 and 15, and on February 16 drove four piles in Pier HC-2. These piles were being driven to an average depth of 140 feet as compared to the State's estimate of 75 feet. On February 20, 1962, this matter was discussed by telephone with Assistant District Engineer, Ralph Hollweg, to the effect that the overrun was alarming and warranted close examination by the District Engineer's office."

p. II-39 "The cast-in-place concrete piles on this project were considered by TAMS to develop their load-carrying capacity by a combination of side friction and point bearing. It was noted that the set-up of the soil experienced after an interval of one day after driving, indicated that the frictional resistance, which was minor during driving, built up rapidly after the driving stopped. Therefore, the

Decision

A3343-4 "To expedite the work TAMS provided the layout, the Claimant having failed to comply with the Contract Proposal. On January 15, 1962 the claimant wrote to TAMS requesting a stake-out of various piers. On February 2, 1962, the State informed the Claimant that it was transferring the responsibility for the stake-out from TAMS to the Claimant in accordance with the obligation imposed on the claimant by the Contract Proposal."

A3344 "The Claimant's allegation (Verified Bill of Particulars, Page 48) that "Throughout the job the State was unreasonably slow in responding to requests by JDP and in supplying necessary clarification, approvals, information, etc." is general to the edge of vagueness and without any visible support in the record.

A3344 [Quote from Specifications, p. 378, h.] "Pile-driving began on February 13, 1962 with a pipe-step tapered pile to a depth of 106 feet in Pier HC-1. The subcontractor continued driving piles at HC-1 on February 14, and 15, 1962. On February 16, 1962, it drove four piles in Pier HC-2. These piles were driven an average of 140 feet without obtaining the required blow count, a figure in excess of the State's estimate of 75 feet."

A3345 "The so-called Engineering News Record Formula of measuring driving resistance by blows per foot and of determining the allowable load capacity was regarded as unreliable by TAMS. Although the Public Works Specifications (Item 88P) makes provision for load tests for piles, the manner of loading a test pile must be as shown or indicated in the plans or as ordered by the Engineer.

State's Exhibit Y (Claim Report)

driving resistance measured in blows per foot was not considered to be a reliable indication of the frictional resistance. The ENR formula is also an unreliable indication of determining the allowable load capacity of the piles. The only reliable method for determining such capacity would be through performing load tests. Load tests were not included in the Specifications issued by the Albany office of NYSDPW."

p. II-38 "This criterion was confirmed by the District Engineer in a letter dated July 25, 1962 for installation of cast-in-place Concrete Piles-Open End, to wit: 'The required driving resistance shall be 150% of that computed from the ENR formula, utilizing the 35-ton pile bearing requirement . . . .'"

pp. II-41, 42 "On August 14, 1962 the Resident Engineer's diary recorded the driving of a 221′ length pile in the HA-abutment. The Resident Engineer contacted the TAMS office (Dr. Chu) and representatives of the State, Mr. S. B. Schiffman and R. L. Carter, in order to study the feasibility of "freezing" piles at 110-115 foot depths. Pipe piles of 12″ diameter were driven on August 15, 1962 and allowed to remain undisturbed over-night. Dr. Chu of TAMS and R. L. Carter of the State were witnesses to the redriving of the piles. The tests showed favorable results, and the District office on August 16 approved new criteria for pile driving in said abutment, and a minimum pile length of 110 feet was set. Correspondence by Consultant of August 21 and approval by D.E. on September 7 verify the verbal approval of this pile driving criterion."

pp. II-68-70 "The above letters, with the exception of (f), were addressed to TAMS and did not have the subject of extensions of time as their main theme. We believe that the excerpts which we have quoted clearly demonstrate that the requests for extensions of time, which Claimant refers to in his claim, were informal, at best."

[Quotes Art. 4 of standard specifications concerning filing time for formal application for extension of time.]

Decision

Neither the Contract Proposal nor any order of the District Engineer dealt with the subject."

"As late as July 25, 1962, the District Engineer, in a letter to TAMS, stated the standard for the installation of cast-in-place concrete piles.

> "The required driving resistance shall be 150% of that computed from the Engineering News Record formula utilizing the 35 ton pile bearing requirement. . . ."

A3345-6 "On August 14, 1962 according to the Resident Engineer, a 221 foot pile was driven in the HA-Abutment. On August 15, 1962 TAMS studied the feasibility of "freezing" piles at no more than 110-115 foot depths, and an experiment the same day (In allowing the piles to remain undisturbed overnight) proved successful. On September 7, 1962 the District Engineer approved the "freezing" method."

A3348 "Informal written requests for time extensions and reimbursements appeared in letters, dealing with other subjects, from the Claimant to TAMS dated January 23, 1962" (sic).

A3349-50
[Quotes Art. 4 of standard specifications concerning filing time for formal application for extension of time.]

State's Exhibit Y (Claim Report)

[Refers to letters and statements of State of March 20, June 26, November 8 and December 31, 1962; January 11, January 31, 1963, June 13, 1963 and August 8, 1963.]

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p. II-81 [as to damages in the Second Cause of Action the State's consultants denied liability on all sixteen items except item 10:]

"10. Additional Cost for Siliconing Deck of Viaduct in the amount of $3,232.81 *Our comments are:* Payment of this additional cost may be allowable since the silicone was added on instructions from the State."

THIRD CAUSE OF ACTION

p. III-1 *"Our comments are:* It seems that the Claimant has based his claim for additional payment in the amount of $455,008.62 in Claim III on the conditions and allegations previously described in Claims I and II."

FOURTH CAUSE OF ACTION

pp. IV-1 to IV-16 [All 16 miscellaneous items were rejected in the State's consultants' report.]

p. IV-5 As to item 5, test cores, letter of District Engineer "of April 28, *1969*" is quoted. (sic) [The date is a typographical error.]

Decision

[Refers to letters and statements of State of March 20, June 26, November 8 and December 31, 1962; January 11, June 13 and August 8, 1963.]

A3351 Second Cause of Action damages:

"Of the sixteen items comprising the total amount only Item 10 is one for which the Court finds the State liable. The Claimant incurred the additional cost of siliconing concrete deck work in the sum of $3,232.81. . . . The silicone was added at the State's instructions . . ."

THIRD CAUSE OF ACTION

p. 35 A3352 "The Third Cause of Action is based entirely upon the conditions and allegations already set forth in the First and Second Causes of Action with both of which the Court has already dealt. The Claimant seeks to burden the State with the responsibility for delay in completing the contract from its scheduled date, October 30, 1963, to its extended date, July 16, 1964."

FOURTH CAUSE OF ACTION

A3356-63 [All 16 miscellaneous items were rejected in the decision except item 14, additional reinforcing steel in connection with the redesign at the HE Ramp.]

A3357 [As to item 5, test cores, letter of District Engineer "of April 28, *1969*" is quoted (sic). [The identical typographical error appears in the decision as in the claim report.]

Supreme Court, U. S.
FILED
JUL 10 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1977

No. 77-1607

JOHNSON, DRAKE & PIPER, INCORPORATED,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
Telephone (518) 474-7121

RUTH KESSLER TOCH
Solicitor General

RICHARD J. DORSEY
Assistant Attorney General
of Counsel

Daily Record Corporation
Rochester, New York
(3949)
Typesetting Law Printing
Syracuse, New York

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JOHNSON, DRAKE & PIPER, INCORPORATED,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary

This case arose out of a contract between petitioner contractor and respondent State whereby petitioner agreed to construct an elevated highway in the Borough of Queens, City and State of New York. After completion of its work petitioner filed a claim in the State Court of Claims alleging various breaches.

After trial of all the issues the New York Court of Claims made an award on a limited number of claims, but dismissed the major claims (Decision unreported). Following this petitioner appealed to the New York Department Appellate Division which unanimously affirmed (49 AD2d 776). Petitioner then appealed to the New York State Court of Appeals New York State's highest Court, which also affirmed (43 NY2d 677).

Petitioner now seeks review by this Court of two questions involving alleged denial of due process rights under the Four-

teenth Amendment of the United States Constitution. It is respondent's contention that there is no jurisdiction under 28 U.S.C. § 1257(3) since petitioner never raised these federal questions in the State Courts.

It is respondent's further position that the use of a claims analysis by the Trial Court (which is the subject on which petitioner now asserts Fourteenth Amendment rights) was primarily a matter of admissibility of evidence and the ruling of the State's highest Court on such evidentiary issue is controlling.

Statement of the Case

Petitioner, a large construction firm, entered into a contract, dated October 31, 1966, with respondent State for the construction of a portion of Van Wyck Expressway in the Borough of Queens, City of New York. Petitioner had been low bidder on the project with a bid of $11,097,756.50.

Although required by the contract documents to make a thorough investigation of the site before bidding, petitioner made only an extremely limited investigation of subsurface conditions. In actual performance, petitioner encountered difficulties it did not anticipate including pile lengths running longer than estimated. Petitioner made a late start in its cofferdaming work in the Flushing River and experienced the collapse of a number of inadequate cofferdams which delayed the work and added to the expense. Petitioner had difficulties coordinating within its own subcontractors and other contractors.

The agreed completion date for the contract was October 30, 1963. In accordance with contract requirements petitioner submitted a progress schedule which showed accomplishment of the various components of the work by this stiuplated date. Early in performance it was apparent that petitioner was not staying up with its own progress schedule, particularly in connection with the rate of pile production.

When petitioner fell behind, the State made efforts to have petitioner increase its forces and production to accomplish the work by the agreed date. Petitioner claimed this "acceleration" was an actionable breach of contract.

By making additional effort, petitioner almost caught up with its progress schedule by the end of the original performance period.

After completion, petitioner filed a claim with the State Court of Claims alleging a number of causes of action for breach and seeking some $4 million in addition to what it had been paid under the contract.

Opinions Below

New York Court of Claims (Trial Court)

After a lengthy trial in which petitioner was given an opportunity to present its proof, the Court of Claims rejected the principal causes of action asserted by petitioner, although allowing recovery of various smaller items. The Court found that petitioner had made a totally inadequate site investigation and was indifferent to its contract responsibilities. It rejected petitioner's "acceleration" damages theory noting petitioner's lack of progress on its own schedule. The Court discussed various causes of action and subcomponents thereof in considerable detail in a decision running some 62 pages in length. The opinion is unreported.

New York Appellate Division (49 NY AD2d 776)

In a unanimous decision, the Appellate Division, Third Department, affirmed the judgment of the Court of Claims. It noted that petitioner had made only a cursory site investigation and that it was put on notice by other contract specifications that a dynamic pile driving technique would be used. It further affirmed findings of petitioner's errors in cofferdam design. It

noted that the State, when attempting to accelerate, was seeking completion of the project by the agreed upon date.

Upon such appeal petitioner argued against use or reliance by the Trial Court on a claims analysis prepared by the State's project designer and construction consultant, Tippetts - Abbett - McCarthy - Stratten. The Appellate Division held that the Court of Claims was entitled to rely upon the analysis to the extent it deemed justified at reaching its decision and noted that the Court had specifically informed the parties it would disregard any objectionable material therein.

New York Court of Appeals (43 NY2d 677)

In a unanimous decision the New York Court of Appeals affirmed the order of the Appellate Division. It held that issues regarding claimed overruns in pile foundation work and claimed delays and alleged misrepresentations affecting pile foundation work and the scope of cofferdam work being resolved by the Court of Claims and such resolutions being affirmed by the Appellate Division, were beyond the scope of its review.

The Court of Appeals agreed that in the light of the express qualifications on its use stated by the trial judge, the Court of Claims was entitled to utilize the claims analysis prepared by the project designer and consultant to the extent it deemed justified in reaching its decision.

Questions Involved

1. Did the petitioner properly raise in the State Courts the purported federal questions it now seeks to argue?

2. Does the State trial court's admission into evidence and reliance on a claims analysis and the state appellate courts' approval of such reliance constitute a substantial federal question in any event?

Reasons for Denying Certiorari

A.

Petitioner now seeks to have this Court review two purported due process questions under the Fourteenth Amendment of the Constitution of the United States (Br., p. 2).

However, petitioner never presented any such federal questions in all the state court proceedings. Under 28 U.S.C. § 1257 (3) in order to confer jurisdiction on this Court, the federal right claimed must have been "specially set up or claimed" in the courts below. It was held in *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1869) that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right". In the case at bar we do not even have a mere inference of such questions.

Petitioner never referred to the Fourteenth Amendment provision it now asserts in any of its arguments in the state courts.

Strangely, it states the "stage in the proceedings at which the denial of due process herein became fully apparent was after trial, at the time of the *decision* of the Court of first instance" (Br., p. 6). If that is so, why did not petitioner assert such right in its appeal to the Appellate Division from this decision?

Petitioner's Appellant's Brief to the Appellate Division attacked the use of the claims analysis as a separate point of argument, but did not even mention the United States Constitution. It raised no federal questions. Under questions involved in such brief, it stated:

> "6. Was a State claim report, prepared by the State's Resident Engineer after this action was commenced properly admitted into evidence and entitled to any probative weight?

"The Court below received the report into evidence and accorded it great probative weight in its decision."

Petitioner attempts to rely on *United States* v. *El Paso Natural Gas Co.*, 375 U.S. 651, 656, 657 (Br., p. 7). But *El Paso* did not involve a constitutional question but the adequacy of findings. Petitioner's Reply Brief in the Appellate Division likewise omitted any federal question. If a constitutional question were to be raised under New York law, it should have been raised in the Trial Court or in the Appellate Division.

Petitioner's Appellant's Brief to the Court of Appeals again raised no federal question in regard to use of the claims analysis. There was no mention of the United States Constitution. At most petitioner introduced at this stage a question predicated on its view of the separation of powers, i.e., it attacked judicial dependency by the State Court of Claims on a review offered by the executive branch (apparently the State Department of Public Works). This was not a federal question. Petitioner made one comment that "[This] is utterly contrary to the intent of the Constitution" but nothing identified this as the federal Constitution. The context it appeared in was claimant's argument regarding separation of branches of state government. Again its Reply Brief in the Court of Appeals is silent as to raising a federal question. Even if at this point it had raised a state constitutional question, it would have been untimely. A constitutional question cannot be raised for the first time in the Court of Appeals. *Nathan* v. *Equitable Trust Co.*, 250 N.Y. 250, 253 (1929).

Finally, in petitioner's application in the New York Court of Appeals for reargument (which petitioner depends on for extending the time to file this petition for a writ of certiorari) petitioner raised no federal question. It did not even mention the claims analysis.

B.

The State courts are empowered to rule on admissibility of evidence in local State matters. Here all courts below, including the highest state court, upheld the admissibility and use of this documentary material. Further review by this Court, it is submitted, would be inappropriate " • • • we rarely disturb local decisions on questions of local practice, and we see no reason to do so in this instance" *Sanford* v. *Ainsa*, 228 U.S. 705, 707 (1913). There is a lack of a federal question. "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs" *Bell Telephone Co. of Penna.* v. *Penna. Public Utility Comm.*, 309 U.S. 30, 32 (1940).

Although petitioner attacks the use of the claims analysis with generalities in its brief, it does not give this Court the background against which this analysis was received in evidence.

This was not a simple, single issue lawsuit. It was a multicause of action construction contract claim involving technical subject matter. There was a mass of documents and records presented to the Trial Court. Claimant also submitted over 500 exhibits, some with little accompanying testimony.

The claims analysis was an organized approach to the issues. "New devices may be used to adapt the ancient institution [trial by jury] to present needs and to make of it an efficient instrument in the administration of justice" *Mtr. of Peterson* v. *U.S.*, 253 U.S. 300, 309-310 [1920]). The analysis discussed the various causes of action and components thereof as amplified by the Bill of Particulars. Its format followed the order of the claim.

The analysis contained a chronological reference to events occurring on the project. It included a tremendous amount of factual data as part of its discussions. Much of this factual data

could be traced to the project engineer's diaries and the inspector's reports which were in evidence. It contained frequent quotations from the contract documents which were in evidence. It also contained expressions of engineering opinion.

This analysis was introduced on the State's direct case in the testimony of a highly experienced licensed professional engineer, Frank Lilien. Mr. Lilien testified that if asked questions with respect to what was incorporated in the report he would testify substantially as set forth (A 2969).

Petitioner indicates Mr. Lilien did not prepare any of the report (Br., p. 6). Mr. Lilien did not write the report but read and edited it (A 2971, 2978, 3034). Mr. Lilien devoted considerable time going over the report before its presentation (A 2971).

In the same trial before the claims analysis was offered, petitioner offered with the testimony of petitioner's soils expert, Dr. Rutledge, a soils report volume which was not prepared by that witness. Instead it was prepared by personnel of Dr. Rutledge's firm. Like Mr. Lilien, Dr. Rutledge reviewed the draft and made certain changes (A 1698).

Dr. Rutledge had no personal knowledge of the design or construction of this project other than from looking at the records (A 1750). By contrast Mr. Lilien, the proponent of the claims analysis, lived with the project. He was the consultant's partner-in-charge during its performance (A 2967). He personally visited the project on many occasions.

Mr. Lilien was tendered to petitioner for cross-examination in connection with the report (A 2980). Petitioner engaged in extensive cross-examination of its contents (A 2980-3045). Thereafter petitioner did not seek to present any rebuttal.

After hearing all the evidence, the Court of Claims rendered a detailed and extensively documented decision in this matter (Br., pp. A6-A58, A3308-3370). This decision incorporated numerous findings of facts relating to the many issues raised by the claim.

Petitioner indicates that the decisions appealed from involve an undesirable interpretation of the New York Court of Claims Act which establish different rules of evidence for complex construction claims in the future (Br., pp. 11). This does not present a federal question. "As to the admission of the award and the receipt in evidence, the rulings involved the application either of the general or the local law of evidence, and as such furnish no grounds for our interposition." *Sherman* v. *Grinnell*, 144 U.S. 198, 202 (1892). Petitioner also implies reviewability because the project was constructed with federal aid (Br., pp. 3, 12). This likewise does not present a federal question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: June 29, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
Telephone (518) 474-7121

RUTH KESSLER TOCH
Solicitor General

RICHARD J. DORSEY
Assistant Attorney General
of Counsel